

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF OHIO
3 WESTERN DIVISION

4 OLD GRANITE DEVELOPMENT, LTD., - Case No. 3:06-CV-2950
5 Plaintiffs, - Toledo, Ohio
6 v. - May 21, 2008
7 CITY OF TOLEDO, - TRIAL
8 Defendants. -

9
10 VOLUME 3
11 TRANSCRIPT OF TRIAL
12 BEFORE THE HONORABLE JACK ZOUHARY
13 UNITED STATES DISTRICT JUDGE, AND A JURY

14 APPEARANCES:

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Proceedings recorded by mechanical stenography,
transcript produced by notereading.

08:08:05 1 (Reconvened at 8:08 a.m.)

08:08:05 2 THE COURT: We have a juror who has an
08:08:05 3 issue, so we're going to handle it on the record. If
08:08:05 4 you're not a lawyer in the case, I'd ask you to leave
08:08:05 5 the courtroom, please.

08:08:05 6 We have a juror number 8 whose home in
08:08:05 7 Michigan burned down last night. She's distraught and
08:08:05 8 distracted. It's appropriate to let her go if that's
08:08:05 9 what she wants to do.

08:08:05 10 (Juror enters the courtroom.)

08:08:05 11 THE COURT: The record should reflect we're
08:08:05 12 here in court with Juror Number 8, Jennifer Sherman. I
08:08:05 13 also have counsel present for both sides. It is only
08:08:05 14 us and no one else.

08:08:05 15 Mrs. Sherman, I understand that something
08:08:05 16 bad happened last night that is distracting you.

08:08:05 17 THE JUROR: Yes. We have a lake house up in
08:08:05 18 northern Michigan which my parents reside in all year.
08:08:05 19 And there's two sections of the home. There's the main
08:08:05 20 house, and the little cottage. That's where we reside
08:08:05 21 in the summertime. Well, it burned yesterday about
08:08:05 22 noon. My parents are fine, but there's -- the cottage
08:08:05 23 is gone. So that's kind of on my mind.

08:08:05 24 THE COURT: Understandably so. Then the
08:08:05 25 question comes: Can you remain on this case and keep

08:08:05 1 your focus on the case with the fire and all that goes
08:08:05 2 with it, or can you not?

08:08:05 3 THE JUROR: As a mature adult I could
08:08:05 4 probably do it. I mean, it's little overwhelming. My
08:08:05 5 kids are freaked out. It's our home. We own it.
08:08:05 6 Insurance adjusters are coming. My parents are 70
08:08:05 7 years old. Things can move on in life, but --

08:08:05 8 THE COURT: It is your preference to be
08:08:05 9 excused?

08:08:05 10 THE JUROR: It would certainly help out
08:08:05 11 because I think we need to go up there.

08:08:05 12 THE COURT: Sure. Counsel for either side
08:08:05 13 have any objection to excusing this juror?

08:08:05 14 MR. ROBON: No objection.

08:08:05 15 MR. BAHRET: No.

08:08:05 16 THE COURT: You're excused.

08:08:05 17 What does she need to do?

08:08:05 18 THE JUROR: I'm sorry.

08:08:05 19 THE COURT: That's okay. That's the kind
08:08:05 20 of thing we want you to tell us. And we're sorry, and
08:08:05 21 we hope it all works out.

08:08:09 22 (End of side-bar discussion.)

08:08:49 23 (The jury enters the courtroom.)

08:11:28 24 THE COURT: Of course they decided to mow
08:11:31 25 right outside our window this morning, but hopefully

08:11:33 1 that won't distract you.

08:11:36 2 Ladies and gentlemen, Mrs. Sherman had a
08:11:39 3 family misfortune, a fire in a home in Michigan. And
08:11:42 4 so that is the reason why she has been excused.
08:11:46 5 There's obviously a distraction there and some things
08:11:49 6 that need immediate attention. It was a home that her
08:11:53 7 elderly parents lived in year round. They are fine.
08:11:57 8 But that is the reason why she has been excused.

08:12:01 9 And so we may now continue with the direct
08:12:04 10 examination of Mr. McCarthy, which is where we left off
08:12:07 11 yesterday.

08:12:07 12 MR. ROBON: Thank you.

08:12:09 13 - - -

08:12:09 14 JOHN MCCARTHY, CONTINUED DIRECT EXAMINATION
08:12:10 15 BY MR. ROBON:

08:12:10 16 Q. John, would you come over here so we can talk
08:12:13 17 about Exhibit Number 4. Would you explain to the
08:12:22 18 jury --

08:12:23 19 THE COURT: Mr. Robon, you're going to need
08:12:27 20 to use the mike, especially with the mowing. Mr.
08:12:33 21 McCarthy may need to share it with you.

08:12:33 22 BY MR. ROBON:

08:12:42 23 Q. The graphic artist drew this with your
08:12:45 24 assistance, correct?

08:12:46 25 A. Yes.

08:12:47 1 Q. Would you explain to the jury what the various
08:12:51 2 layouts are? This is before the new water main and the
08:12:58 3 trees were removed? Step back so they can all see it.

08:13:02 4 A. Good morning.

08:13:05 5 We drew this up to try to help visualize the
08:13:14 6 situation before the trees were cut and that kind of
08:13:19 7 thing. The main features here are, of course, the
08:13:26 8 trees themselves that looked something like this that
08:13:30 9 were on -- this is the old -- what I refer to as the old
08:13:35 10 railroad bed. This is the active railroad. This is the
08:13:39 11 far side, the creek that the system here connects to and
08:13:48 12 takes out of there. This is the house that's on lot
08:13:54 13 15, which just about everything we have here today is
08:13:57 14 really based at this point on lot 15. And this
08:14:02 15 indicates that the drainage system that the development
08:14:06 16 put in and takes this -- the development's water,
08:14:11 17 rainwater run off, out to River Road.

08:14:15 18 Q. Is that the one that we saw as we walked in the
08:14:18 19 back on the left side that was tilted upwards so you
08:14:23 20 could see it?

08:14:23 21 A. Yes. This one was the cover was tilted up. If
08:14:26 22 you walked out there Monday you would have seen this
08:14:29 23 one. That connects out to River Road. If we're going
08:14:39 24 to get into this drainage, this is kind of important
08:14:41 25 because in developments today, you put a new development

08:14:46 1 in --

08:14:47 2 MR. BAHRET: Your Honor.

08:14:47 3 THE COURT: Sustained. Let's keep our
08:14:49 4 focus.

08:14:51 5 Q. Just explain what the graphic is depicting?

08:14:55 6 A. The house, this is the house that my son lives
08:15:02 7 at, if I refer to it that way. This is the railroad
08:15:15 8 culvert that we were talking about yesterday that was
08:15:19 9 there ahead of time. This is the -- there's a pipe
08:15:23 10 running this way along this area. This is a ditch area
08:15:29 11 on this side.

08:15:30 12 Q. Is that the same as this pipe here?

08:15:36 13 A. Yes. This is the pipe. This is the pipe that
08:15:40 14 goes into this manhole from this direction. In this
08:15:47 15 view the pipe is going this way. It's a T, this way
08:15:53 16 and that. It shows the main features that were there
08:16:03 17 before the project.

08:16:04 18 Q. And there were two rows of trees in the ditches;
08:16:09 19 one closer to the home, and one closer to the active
08:16:12 20 tracks. Like is shown on Exhibit Number 1 where you
08:16:24 21 have a row of trees here, and then a second line, a row
08:16:34 22 of trees here, and then a second row closer to the
08:16:37 23 tracks. Is that what we're depicting here?

08:16:40 24 A. Yes, Marv. This is one row here. This is
08:16:44 25 another row.

08:16:45 1 THE COURT: Excuse me, gentlemen. You're
08:16:48 2 blocking the view of some of the jurors.

08:16:52 3 Q. Can you use the pointer?

08:16:57 4 THE COURT: You're still making it difficult
08:16:59 5 for those behind you to see.

08:17:02 6 A. Sorry. There's two long rows of trees. This is
08:17:06 7 the old railroad bed that we're talking about. There's
08:17:08 8 two long rows of trees before the city project; one row
08:17:15 9 here, one row here.

08:17:18 10 Q. That's what these two --

08:17:20 11 A. That's what they're depicting there. I think
08:17:29 12 that's the essentials, Marv.

08:17:33 13 Q. I want you to compare that with Exhibit Number 5,
08:17:36 14 which is the graphic that is shown in the "after." And
08:17:43 15 what difference is there now with regard to what the
08:17:49 16 City did on this project?

08:17:50 17 MR. BAHRET: Objection.

08:17:55 18 THE COURT: Grounds? He can comment on the
08:17:58 19 differences between two exhibits.

08:18:00 20 MR. BAHRET: But he's not qualified to say
08:18:02 21 because of what the City did.

08:18:04 22 THE COURT: Amend the question to explain
08:18:05 23 what the differences are between the two graphics,
08:18:09 24 please.

08:18:11 25 A. The two main differences here is, of course, the

08:18:14 1 trees are missing.

08:18:16 2 THE COURT: Still can't see. You're going
08:18:18 3 to have to come around to the other side of the exhibit
08:18:22 4 where Marv was standing. There you go. Turn around.

08:18:29 5 A. The trees have been cut down, are missing. The
08:18:35 6 cross drain that drains this area here, that's been cut
08:18:40 7 because the water main is in there, and the new water
08:18:45 8 main is shown; that's how the -- that's roughly where
08:18:51 9 the new water main, City water main was put in. But
08:18:54 10 that's the main difference.

08:19:01 11 Q. What about -- you show water over here flooding.
08:19:06 12 That is caused by what?

08:19:10 13 A. Without this pipe, this drain pipe, which is a
08:19:18 14 main culvert for the area, this is what we predicted the
08:19:23 15 flooding would be from a study of the water shed in the
08:19:31 16 area. We predicted this would be a bed that would
08:19:36 17 basically have to go over the top of the railroad to get
08:19:39 18 out. That's what that water is indicating. And I
08:19:46 19 think when you were out there you saw some -- there was
08:19:50 20 just some puddles out here indicating the more normal
08:19:58 21 condition, small amounts of ponding laying out in the
08:20:02 22 back here. But we predicted that.

08:20:07 23 MR. BAHRET: Your Honor, I object to the
08:20:09 24 "we." He's the only one that predicted it.

08:20:12 25 BY MR. ROBON:

08:20:13 1 Q. Just do what you predicted.

08:20:15 2 THE COURT: With that correction, you may
08:20:17 3 continue.

08:20:20 4 A. I predicted this from our study of the water
08:20:27 5 shed, and I have an associate that helped me with it;
08:20:33 6 that's why I use the word "our." That's really the
08:20:36 7 differences.

08:20:38 8 Q. Thank you. You can take your seat.

08:20:51 9 And, John, then Exhibits 4 and 5 accurately
08:20:54 10 depict what are shown on those exhibits, correct?

08:20:57 11 A. Yes.

08:21:14 12 Q. I'm going to put up Exhibit Number 37. And the
08:21:47 13 water that is shown in Exhibit 37, is that the water
08:21:51 14 that you're making reference to on Exhibit Number 5 over
08:21:58 15 here behind Mike's house?

08:22:02 16 A. Yes, it is. This is a lesser storm in the summer
08:22:07 17 of 2006, and this was the condition that resulted from
08:22:12 18 that.

08:22:22 19 Q. I want you to take a look at Exhibit Number 95.
08:22:45 20 Can you tell the jury when this photograph was taken,
08:22:49 21 who took it, were you there, and what does the stake
08:22:52 22 show?

08:22:57 23 A. Marv, I'm having a little trouble reading -- with
08:23:03 24 the glare and stuff I'm not -- okay. I think I know
08:23:07 25 what it --

08:23:08 1 Q. Take a look at it first.

08:23:13 2 THE COURT: First, who took it and when,
08:23:15 3 please?

08:23:17 4 BY MR. ROBON:

08:23:17 5 Q. Did you take that photo, or was it taken while
08:23:20 6 you were out there?

08:23:24 7 A. This photo was taken by my men, and I don't know
08:23:32 8 what the date is here on it.

08:23:35 9 Q. Probably 2006?

08:23:37 10 A. Yes, it was 2006.

08:23:38 11 Q. Was it after the cutting?

08:23:40 12 A. Yes, apparently there's signs of clearing here.

08:23:48 13 But there is a --

08:23:50 14 Q. What does the stake depict? Is that the
08:23:54 15 property line?

08:23:56 16 A. Yes. This is -- this has to be the property
08:24:02 17 line because this is the timbers that were right near
08:24:05 18 the property line.

08:24:15 19 Q. Did you see the big -- it looks like a railroad
08:24:19 20 tie -- in the back?

08:24:20 21 A. Yes.

08:24:21 22 Q. And is the property line stake closer to the
08:24:25 23 railroad?

08:24:26 24 A. Yes, it is. Maybe we can make this brighter.

08:24:48 25 THE COURT: Why don't you just take the

08:24:50 1 photo and hold it in front of the jury box if you like.

08:24:57 2 MR. ROBON: We're referring to this big post
08:25:00 3 here, and this is the property line.

08:25:01 4 MR. BAHRET: Your Honor, I don't think he
08:25:04 5 should be talking to the jury. He can show them the
08:25:06 6 document.

08:25:09 7 THE COURT: Is that a stake, Mr. McCarthy,
08:25:12 8 that you put there? Whose stake is that, if you know?

08:25:16 9 THE WITNESS: I'm not sure.

08:25:17 10 THE COURT: Thank you.

08:25:19 11 BY MR. ROBON:

08:25:19 12 Q. But does the photograph accurately depict what
08:25:21 13 was there at the time?

08:25:22 14 A. Yes, it depicts that.

08:25:26 15 Q. I'm going to mark up here Exhibit Number 55.
08:25:33 16 Now, can you indicate, what does this photograph depict?

08:25:41 17 A. This depicts -- as we were showing yesterday, we
08:25:51 18 showed the clearing; we filled the -- we started
08:25:56 19 building this mound in this area. This is also at my
08:26:00 20 son's house, behind my son's house.

08:26:02 21 Q. This is where the digger is?

08:26:04 22 A. Right. And as we were saying yesterday, we
08:26:07 23 started building the mound right after we thought -- we
08:26:11 24 took all these pictures. We tried to get the City
08:26:16 25 surveyors to come out. Christy did come out.

08:26:19 1 Q. Just tell us what the picture shows.

08:26:21 2 A. Well, I'm trying to say, just to get the timing
08:26:24 3 because the timing is --

08:26:25 4 THE COURT: Is there a date on the picture?

08:26:29 5 MR. ROBON: No, there's no date on the
08:26:30 6 picture.

08:26:31 7 THE WITNESS: But this would have been in
08:26:32 8 the June timeframe.

08:26:34 9 BY MR. ROBON:

08:26:34 10 Q. And on the right side, what are those big items?

08:26:39 11 A. This is the -- this is the water main pipe before
08:26:44 12 it was put in. It was stored right along the property
08:26:48 13 line, just a couple feet, as you can see here.

08:26:53 14 Q. Does this picture show where you're removing the
08:26:56 15 earth to show the roots of the brambles and things?

08:26:59 16 A. This is what this is. This is after we filled
08:27:02 17 it in so we could document it, bring this to the
08:27:06 18 surveyors to survey each of the clumps of earth.

08:27:10 19 Q. I'm going to mark Exhibit Number 58. Is that
08:27:14 20 just the same thing but a little bit closer view where
08:27:18 21 it shows at the bottom the various roots that were
08:27:23 22 exposed?

08:27:24 23 MR. BAHRET: Objection.

08:27:24 24 THE COURT: Overruled. He may answer.

08:27:27 25 A. Yes. Those are -- those dark areas, as you can

08:27:31 1 see there, are some of the roots that we were digging
08:27:35 2 out. And you can see that the property line are these
08:27:41 3 stakes, particularly --

08:27:44 4 Q. Are the stakes up here in this area -- look up on
08:27:49 5 this one, John. Is that the property line stake right
08:27:53 6 there?

08:27:54 7 A. Yeah, this one's kind of fuzzy.

08:27:56 8 MR. BAHRET: Your Honor, I'm going to object
08:27:58 9 to this because those are not survey stations. He
08:28:01 10 bulldozed them, and he put those there for these
08:28:04 11 pictures.

08:28:04 12 THE COURT: Well, let's clarify whose stakes
08:28:06 13 they are and when they were placed and give some
08:28:11 14 identification to them.

08:28:11 15 BY MR. ROBON:

08:28:13 16 Q. You didn't take these pictures, did you, John?

08:28:15 17 A. No, I didn't.

08:28:17 18 Q. Weren't these pictures taken when you were out
08:28:19 19 there by Ric-man Construction?

08:28:21 20 A. My understanding was that was true. We didn't
08:28:24 21 take these. He --

08:28:27 22 THE COURT: You don't know who took these
08:28:29 23 photographs; yes or no?

08:28:32 24 THE WITNESS: Yes.

08:28:34 25 THE COURT: Yes.

08:28:36 1 THE WITNESS: I had seen Ric-man's
08:28:38 2 superintendent came out there. He had a camera.

08:28:42 3 THE COURT: You believe this is a photo that
08:28:44 4 Ric-man took?

08:28:45 5 THE WITNESS: Yes.

08:28:46 6 THE COURT: Thank you.

08:28:47 7 Q. And he took pictures of you doing the work,
08:28:50 8 right?

08:28:51 9 A. Yes.

08:28:52 10 Q. And here you've exposed all kinds of roots and
08:29:00 11 brambles that look like they had about two or three feet
08:29:03 12 of earth on them, correct?

08:29:04 13 A. Yes. And I think the previous photo we had
08:29:07 14 better pictures of the stakes that we could at least
08:29:12 15 take a look that. I think that he --

08:29:20 16 Q. Which is picture 55?

08:29:22 17 A. Yes.

08:29:23 18 Q. Whose stake is this one here in the front?

08:29:27 19 A. These stakes were from the contractor or City.
08:29:36 20 I'm not sure who exactly put them in. But these were
08:29:40 21 the stakes we put ours right next to. These were
08:29:42 22 identified in those previous pictures. These were
08:29:47 23 confirmed as far as I was concerned; these were the
08:29:50 24 confirmed property lines on this stake here.

08:29:57 25 Q. Okay. And photograph number 59, this is just a

08:30:24 1 conglomerate of four photos basically showing the same
08:30:28 2 thing the other photos showed, the pipe before it's
08:30:31 3 installed and where you had excavated?

08:30:34 4 A. Yes.

08:30:36 5 Q. Now, would you tell the jury, you said you
08:30:39 6 delivered mud or earth one day?

08:30:42 7 A. Yes.

08:30:43 8 Q. What was the urgency of trying to build a mound
08:30:50 9 or making the place look better?

08:30:56 10 A. Well, the main urgency was that we had -- we were
08:31:05 11 trying -- there were some sales on at the house. This
08:31:08 12 is a sales office right in front of this location. And
08:31:11 13 you couldn't, at least as far as I was -- I understood,
08:31:20 14 no one would even come down the road and stop at the
08:31:22 15 sales office after this had happened. And we needed to
08:31:25 16 put --

08:31:25 17 MR. BAHRET: Objection, Your Honor. There's
08:31:27 18 no evidence that anybody had been there in three years
08:31:29 19 before either.

08:31:32 20 MR. ROBON: I'll rephrase.

08:31:33 21 THE COURT: I'll ask the jury to disregard
08:31:34 22 that answer. And let's try to keep our focus, please.

08:31:37 23 BY MR. ROBON:

08:31:37 24 Q. Did Mr. Laskey have an auction of some of the
08:31:41 25 lots?

08:31:42 1 MR. BAHRET: Objection.

08:31:44 2 Q. Were you aware of the auction?

08:31:46 3 A. Yes.

08:31:47 4 Q. When was the auction of the lots scheduled?

08:31:50 5 A. June.

08:31:52 6 Q. Of '06?

08:31:53 7 A. It was June of '06. This was May of '06. May
08:31:58 8 11 we put the fill in.

08:32:20 9 Q. Now, we've talked about the cutting of the drain
08:32:23 10 pipe. Have you as an engineer -- you mentioned that
08:32:29 11 the water is ponding behind the house. Have you come
08:32:33 12 up with a plan or cost of how to get rid of that access
08:32:38 13 water?

08:32:40 14 A. Yes. I went and --

08:32:43 15 Q. Tell us.

08:32:45 16 A. I asked the excavator that we use, the one that
08:32:49 17 put the original pipe system in this project, whose --
08:33:03 18 the name, he was our excavator, Sanberg, Ted Sanberg is
08:33:08 19 the name of the excavator. I asked him what he thought
08:33:12 20 it would cost me to take the water out to River Road
08:33:16 21 back through the -- with this pipe cut. We talked about
08:33:21 22 the pipe cut, and I asked him what the estimate was,
08:33:25 23 what would be --

08:33:26 24 MR. BAHRET: Before we get there, I'm going
08:33:27 25 to object.

08:33:29 1 THE COURT: He can testify about what he was
08:33:31 2 told.

08:33:31 3 BY MR. ROBON:

08:33:31 4 Q. Tell us what you believe the costs are, not what
08:33:37 5 someone told you. From your investigation, what do you
08:33:40 6 believe to a reasonable degree of certainty Old Granite
08:33:44 7 is going to have to spend to clear this water problem?

08:33:48 8 MR. BAHRET: I object. That's hearsay in
08:33:51 9 drag.

08:33:52 10 THE COURT: You can't have somebody tell you
08:33:56 11 something then, without referencing it, say that's your
08:34:01 12 opinion unless you've got a proper foundation that he is
08:34:06 13 qualified to prepare an estimate of that. You need
08:34:08 14 that other person to say that.

08:34:09 15 BY MR. ROBON:

08:34:09 16 Q. Did you work with Mr. Sanberg in coming up with a
08:34:13 17 cost?

08:34:13 18 A. Yes, I did.

08:34:14 19 Q. Would you tell the Court and the jury how you
08:34:19 20 segmented the various costs and what the total costs
08:34:22 21 are?

08:34:23 22 MR. BAHRET: Objection, Your Honor. That
08:34:25 23 doesn't cure the objection.

08:34:28 24 MR. ROBON: Your Honor, I think when he
08:34:29 25 works with an excavator and they work on how many feet

08:34:33 1 they're going to put it and how deep they're going to
08:34:36 2 put it and they're going to dig a retention pond or not,
08:34:40 3 I think he's qualified. He's an engineer.

08:34:42 4 THE COURT: That part, I have no problem
08:34:44 5 with. But when we start talking about the dollars --
08:34:46 6 Mr. McCarthy, did you prepare the estimate of repair,
08:34:49 7 the dollar cost, yes or no?

08:34:50 8 THE WITNESS: Yes, I did.

08:34:51 9 BY MR. ROBON:

08:34:51 10 Q. What was Mr. Sanberg's role in the project?

08:34:54 11 A. He reviewed it, and he confirmed some of the unit
08:34:58 12 prices for piping and that kind of thing. And I
08:35:02 13 prepared it for him.

08:35:04 14 THE COURT: You have prepared estimates of
08:35:07 15 this before?

08:35:08 16 THE WITNESS: Yes, I've done estimates.

08:35:10 17 THE COURT: Not estimates in general;
08:35:12 18 estimates of this type of work?

08:35:16 19 THE WITNESS: Yes, this type of work quite
08:35:17 20 often.

08:35:18 21 THE COURT: Your testimony can only be given
08:35:19 22 with respect to what you did, not what Mr. Sanberg did.
08:35:23 23 And the jury's instructed to disregard this witness'
08:35:26 24 comments about Mr. Sanberg and whether Mr. Sanberg
08:35:31 25 agreed or disagreed with what Mr. McCarthy did.

08:35:36 1 THE WITNESS: I understand.

08:35:37 2 THE COURT: You may proceed.

08:35:39 3 A. I felt Mr. Sanberg's --

08:35:42 4 Q. You can't talk about Mr. Sanberg. I want to know
08:35:45 5 what you think the cost is going to be?

08:35:47 6 A. I came up with an estimate for the piping; it was
08:35:52 7 \$200,000 to take it out to River Road, that we'd have to
08:35:57 8 have a ponding area; that would be as much as \$200,000.

08:36:02 9 Q. 200 more?

08:36:03 10 A. 200 more.

08:36:04 11 Q. To?

08:36:05 12 A. To build a ponding area.

08:36:08 13 Q. That's a retention pond?

08:36:10 14 A. Retention pond for water, that it can't go
08:36:13 15 immediately right back into the Maumee River; that's
08:36:17 16 what -- that's what I came up with.

08:36:20 17 Q. And the numbers and the opinions that you've
08:36:23 18 given here today and yesterday are based upon a
08:36:26 19 reasonable degree of engineering certainty?

08:36:28 20 A. Yes.

08:36:45 21 Q. There was some discussion yesterday when Mr.
08:36:48 22 Huber was here about the contour of the land. You've
08:36:57 23 studied a contour of this whole area; have you not?

08:37:01 24 A. Yes, I have.

08:37:02 25 Q. And which way does the water drain?

08:37:08 1 A. The water.

08:37:10 2 Q. Why don't you come over here and, with the
08:37:13 3 marker, show the jury.

08:37:39 4 What's the number of that exhibit up in the
08:37:41 5 corner?

08:37:41 6 A. Six. The water in the area drains this
08:37:50 7 direction (motioning).

08:37:51 8 Q. Top to bottom?

08:37:52 9 A. Top to bottom.

08:37:53 10 And that area also drains to this area. This is
08:37:57 11 the low point. That's why this cross drain was put in
08:38:01 12 here. This drain is the main drain for this whole area
08:38:06 13 other than our own development, which comes out this
08:38:09 14 way.

08:38:09 15 Q. The development, the water goes out to River
08:38:13 16 Road?

08:38:13 17 A. It goes out to River Road in the storm sewers.

08:38:44 18 MR. ROBON: Your Honor, I have no further
08:38:45 19 questions.

08:38:46 20 THE COURT: Thank you. You may cross.

08:38:49 21 MR. BAHRET: Thank you.

08:38:51 22 - - -

08:38:51 23 JOHN McCARTHY, CROSS-EXAMINATION

08:38:52 24 BY MR. BAHRET:

08:38:52 25 Q. Mr. McCarthy, you know who I am, and you know who

08:38:59 1 I represent, right?

08:39:00 2 A. Yes, I do.

08:39:01 3 Q. We've been together several times?

08:39:04 4 A. Yes, we have.

08:39:05 5 Q. And I took your deposition previously?

08:39:08 6 A. Yes, you did.

08:39:10 7 Q. Have you reviewed that?

08:39:12 8 A. Yes, I did.

08:39:14 9 Q. Any mistakes in it we need to address before we
08:39:17 10 start?

08:39:17 11 A. Two.

08:39:18 12 Q. What are the mistakes?

08:39:20 13 A. Two things that we talked about extensively in
08:39:28 14 the deposition. The first one was the depth of the
08:39:36 15 manhole that we were talking about here. After the
08:39:39 16 deposition I went and I looked back and saw it wasn't as
08:39:43 17 deep as I had mentioned, which you had pointed out,
08:39:47 18 because it made no sense with the center ditch, that the
08:39:51 19 manhole itself --

08:39:53 20 Q. Right. At the time of the deposition you thought
08:39:55 21 the manhole was --

08:39:56 22 A. Manhole was, like, ten feet deep, and that made
08:39:59 23 the trench on the other side, I think I said, 13 feet.
08:40:03 24 And it was not. It was more like nine or ten feet
08:40:07 25 deep. And -- from the top of the railroad. So that

08:40:11 1 information --

08:40:13 2 Q. I planned to talk to you about that, but I guess
08:40:16 3 we've cleared it up already.

08:40:18 4 A. Because the ditch was not that deep. It
08:40:20 5 couldn't have been.

08:40:21 6 Q. Clearly, because at one point you climbed into
08:40:23 7 this manhole upside down?

08:40:25 8 A. Yes.

08:40:25 9 Q. And with your feet outside the manhole with your
08:40:29 10 son holding you, you're able to touch the bottom?

08:40:31 11 A. But I had some tools.

08:40:33 12 Q. You had a very small hand tool?

08:40:35 13 A. I had some small hand tools.

08:40:38 14 Q. You're able to reach, and obviously you're not 12
08:40:42 15 feet tall?

08:40:43 16 A. I had a rake.

08:40:44 17 THE COURT: Careful, folks. You're tripping
08:40:46 18 over each other. Let's let the question get asked.
08:40:49 19 Let the witness complete an answer. Then let's ask the
08:40:53 20 next question.

08:40:53 21 A. Rather than what I had indicated then, that it
08:40:59 22 was 13 feet, it was really nine. And I apologize for
08:41:06 23 that.

08:41:07 24 And the other deposition problem that we spent a
08:41:11 25 long time on was the ditch and whether the stakes were

08:41:15 1 on the one side of the ditch. And I think that when I
08:41:22 2 went back out there and I looked and I saw where this
08:41:26 3 ditch was, I think we had a problem with -- the little
08:41:34 4 ditch with the water it in, yes, the stakes were on the
08:41:37 5 other side. But when I said it was in the center of
08:41:40 6 the ditch, I was referring to the more general swale
08:41:44 7 that was in that area. But the water ditch that people
08:41:47 8 would generally consider a ditch, yes, the stakes were
08:41:50 9 on the Cambridge side of that ditch.

08:41:53 10 Q. And the importance of that is because you know
08:41:56 11 clearing machinery didn't go in through a ditch and
08:41:58 12 clear anything on the other side of the ditch, correct?

08:42:02 13 A. No, I didn't say that.

08:42:03 14 Q. So you think the machinery went through a ditch?

08:42:06 15 A. Oh, they pulled stuff out over the ditch, yes.

08:42:11 16 Q. And you know -- you saw that?

08:42:13 17 A. I did not.

08:42:15 18 Q. Okay. Well, I'll address that with the people
08:42:21 19 that actually did the work since you didn't see it.

08:42:23 20 Were there any other mistakes?

08:42:25 21 A. Those are the only two.

08:42:27 22 Q. In no particular order, let's talk about a few
08:42:29 23 things.

08:42:30 24 One, the very last thing, you whipped up an
08:42:34 25 estimate, and you came up with \$200,000 for a retention

08:42:38 1 pond?

08:42:38 2 A. Yes.

08:42:39 3 Q. Are you aware of the fact that the guy that was
08:42:42 4 responsible for constructing the entire development and
08:42:46 5 did construct this development testified that the cost
08:42:50 6 would be \$35,000 to \$40,000 for a retention pond?

08:42:56 7 MR. ROBON: Objection.

08:42:58 8 MR. BAHRET: Based on what?

08:43:00 9 MR. ROBON: There's no evidence of that.

08:43:01 10 MR. BAHRET: Mr. Taylor testified.

08:43:03 11 THE COURT: Counsel, I'm not going to have
08:43:04 12 either of you testifying in this case. The objection
08:43:07 13 is overruled. The jury can recall what somebody said
08:43:11 14 or didn't say. My jury instruction also address it.

08:43:14 15 So the question is simply, really, it's:
08:43:18 16 Would you disagree with someone who testified or may
08:43:22 17 have testified that the cost for a retention pond would
08:43:25 18 be \$35,000 to \$40,000? Agree or disagree?

08:43:29 19 THE WITNESS: Yes, I would disagree with
08:43:31 20 that.

08:43:31 21 BY MR. BAHRET:

08:43:31 22 Q. Okay. Do you know Mr. Taylor?

08:43:33 23 A. Yes, I do.

08:43:34 24 Q. Do you know he's a builder?

08:43:36 25 A. Yes.

08:43:36 1 Q. Do you know he was the guy in this partnership or
08:43:39 2 this corporation called Old Granite, he was the guy
08:43:41 3 responsible for the construction of the subdivision?

08:43:44 4 A. Yes, I'm aware of that.

08:43:46 5 Q. And he testified that he's familiar with pricing
08:43:49 6 because he's the guy that works the prices up.

08:43:51 7 A. Yes, I'm aware of that.

08:43:52 8 Q. Do you think he just made up the number?

08:43:54 9 A. No, he didn't. He considered a whole different
08:43:58 10 thing. This is more of an engineering thing. He never
08:44:01 11 even considered some of the major costs that I
08:44:04 12 considered.

08:44:04 13 Q. And you know that how?

08:44:06 14 A. Because I've worked in this area, and I know --

08:44:09 15 Q. How do you know what he considered, sir?

08:44:11 16 A. I talked to him.

08:44:12 17 Q. Well, he testified just the other day as to his
08:44:16 18 estimate. So apparently if you talked to him, you
08:44:18 19 didn't change his mind.

08:44:20 20 A. No, he had an idea that you could just go and
08:44:25 21 have a limited retention pond there.

08:44:29 22 Q. And he testified he's familiar with constructing
08:44:32 23 retention ponds?

08:44:34 24 A. He didn't go through the efforts that I went
08:44:36 25 through. He didn't go to the county engineer to find

08:44:38 1 out what kind of pond we might need, what water they'd
08:44:41 2 allow out of there, how big it would have to be. There
08:44:44 3 was none of that done.

08:44:45 4 Q. You said that you participated in these graphic
08:44:51 5 designs?

08:44:53 6 A. Yes, I did.

08:44:55 7 Q. And on this exhibit, which is 5, of particular
08:45:02 8 interest -- can you all see this? I note somebody's
08:45:12 9 depicted water going all the way over touching this
08:45:15 10 house.

08:45:16 11 A. Yes.

08:45:16 12 Q. Have you ever seen the water like that over
08:45:18 13 there?

08:45:18 14 A. No.

08:45:19 15 Q. Anybody ever told you that happened?

08:45:21 16 A. No, it's never happened.

08:45:22 17 Q. Okay. I didn't think so.

08:45:29 18 So this Exhibit 5 does not accurately depict
08:45:32 19 anything that's occurred, does it?

08:45:34 20 A. It's marked on there, Mr. Bahret, that it's a
08:45:38 21 100-year predicted flood level.

08:45:41 22 Q. And, in fact, we've had 100 year flood levels of
08:45:48 23 rain since this crossover pipe was severed, correct?

08:45:52 24 A. No, we haven't. Not in this area.

08:45:57 25 Q. You're aware that others disagree with that and

08:46:00 1 have already testified accordingly?

08:46:02 2 MR. ROBON: Objection.

08:46:04 3 A. No, I'm not aware of that.

08:46:06 4 THE COURT: Overruled.

08:46:07 5 Q. Are you aware of the fact this picture, this
08:46:10 6 Plaintiff's Exhibit 37, that was taken by your son?

08:46:13 7 A. Yes, I believe so.

08:46:14 8 Q. And are you aware of the fact that he says that's
08:46:17 9 the worst the water was right there in that picture?

08:46:21 10 A. Yes.

08:46:22 11 Q. Nowhere near his house?

08:46:24 12 A. No, it's nowhere near his house. We haven't had
08:46:27 13 that kind of rain.

08:46:28 14 Q. When I say his house, I say that advisedly.
08:46:31 15 He's living in a house without paying any rent, true?

08:46:35 16 A. No, that's not true.

08:46:37 17 Q. He says it's true. Do you have knowledge
08:46:39 18 otherwise?

08:46:39 19 A. He has an arrangement with Jack for money.
08:46:43 20 That's not my business.

08:46:44 21 Q. His arrangement is that he was supposed to be
08:46:48 22 paying monthly for the house, or don't you know?

08:46:53 23 A. That's not what he told me.

08:46:56 24 Q. We'll let him speak to that.

08:47:04 25 Sir, you never really studied the Cambridge

08:47:09 1 development before your son called you and said, Hey,
08:47:12 2 they've cut some trees?

08:47:13 3 A. That's true.

08:47:14 4 Q. You never even walked around and measured
08:47:18 5 anything or studied the depth of foliage or anything
08:47:21 6 like that?

08:47:23 7 A. I did not.

08:47:24 8 Q. You did not -- and I'm not saying you should
08:47:28 9 have, sir, but you didn't do anything to ascertain
08:47:30 10 specifically what foliage is on Cambridge property
08:47:34 11 versus on railroad property?

08:47:37 12 A. No, other than just generally viewing the
08:47:40 13 property. I did not go and take special note of it or
08:47:44 14 anything.

08:47:44 15 Q. And I'm not suggesting you had reason to do so,
08:47:50 16 sir, but you didn't -- there was no reason compelling
08:47:54 17 you to try to figure out if all these trees are on the
08:47:57 18 railroad right of way versus Cambridge property is what
08:48:02 19 I'm getting at?

08:48:02 20 A. No, not beforehand.

08:48:04 21 Q. You just knew there were trees out there?

08:48:06 22 A. That's true.

08:48:07 23 Q. And you know that most of those trees were on
08:48:12 24 railroad property now based on your investigation,
08:48:15 25 correct?

08:48:16 1 A. That's true. The stumps were on railroad
08:48:19 2 property, most of the stumps were on railroad property,
08:48:22 3 grew over on his side.

08:48:24 4 Q. And by the stump, that's where the tree is
08:48:29 5 growing on the railroad property, and the foliage could
08:48:32 6 overhang Cambridge?

08:48:34 7 A. Right. And some of the stumps were on
08:48:37 8 Cambridge.

08:48:37 9 Q. A few, correct?

08:48:39 10 A. More than a few.

08:48:41 11 Q. Well, what number do you have? Somebody
08:48:44 12 yesterday said they found seven.

08:48:48 13 A. We're talking about thousands.

08:48:49 14 Q. Thousands of trees?

08:48:52 15 A. Well, what is a tree? As they come out of the
08:48:54 16 ground, you know, that's -- and that type of vine grows
08:49:00 17 up 15, 20 feet.

08:49:02 18 Q. Are you telling me you don't know what a tree is?

08:49:05 19 A. As far as vegetation.

08:49:09 20 Q. Do you know what a tree is?

08:49:11 21 A. A tree is a tree. As far as we're concerned,
08:49:14 22 anything coming out of the ground is a tree, a potential
08:49:18 23 tree.

08:49:18 24 Q. Did you count the blades of grass?

08:49:21 25 A. I did not count the blades of grass.

08:49:24 1 Q. Why not? It comes out of the ground.

08:49:26 2 A. We counted the number of shoots that were of the
08:49:28 3 length that could have gone up 15, 20 feet, and we
08:49:32 4 believe on the Cambridge property there were thousands
08:49:35 5 of trees, what I call trees.

08:49:37 6 Q. Thousands of trees. When you say "we believe
08:49:42 7 there were thousands of trees on Cambridge property,"
08:49:45 8 who's the "we"?

08:49:46 9 A. Well, I'm generally -- I should just refer to
08:49:51 10 myself, but it's my son; I had people working with me;
08:49:55 11 Jack was out there, Jack Laskey was out there with me.
08:50:00 12 That's kind of my "we."

08:50:01 13 Q. These are things that grow out of the ground,
08:50:06 14 have bark on them, branches, and leaves?

08:50:09 15 A. Yes.

08:50:09 16 Q. Thousands?

08:50:10 17 A. Thousands.

08:50:14 18 Q. All right. Your son moved into the house
08:50:18 19 sometime in 2005?

08:50:22 20 A. Yes, he moved in there in 2005. I think that
08:50:30 21 was our other correction. Since we had our deposition
08:50:35 22 we went over and over this. He was -- he was there in
08:50:42 23 2005 visiting -- the house was built. He was visiting,
08:50:47 24 but he really didn't move in -- the best we can come up
08:50:50 25 with now was in about February of 2006 he moved in.

08:50:58 1 But in the previous year, I had gone -- I think we even
08:51:03 2 in the deposition kind of straightened this out -- that
08:51:06 3 I had been visiting there. We had stored a car there.
08:51:09 4 I had stopped there, but really hadn't had any of this,
08:51:14 5 you know, long visit. They were short visits. I think
08:51:17 6 we can remember now what we said in deposition.

08:51:20 7 Q. What you said at deposition was that he moved in
08:51:22 8 there in 2005 and he lived in the house almost a year
08:51:25 9 before the vegetation was removed. And then after a
08:51:29 10 break you came back and said all --

08:51:31 11 A. We corrected that.

08:51:33 12 Q. Let me finish.

08:51:34 13 After the break when you had called him and
08:51:36 14 talked to him, you said he had been there that whole
08:51:38 15 time, but your grandson didn't move in until February of
08:51:42 16 '06. Do you remember that now?

08:51:43 17 A. That's exactly what -- what I'm trying to say
08:51:48 18 here. He moved in in -- the family moved in in 2006.
08:51:54 19 In 2005 I had only been out there on short visits. I
08:52:00 20 read that again just the other night. I think I know
08:52:04 21 what -- I think that was all correct.

08:52:06 22 Q. I don't know how it's corrected, sir. Even
08:52:09 23 after the break during your deposition when you talked
08:52:12 24 to him you came back and affirmed he had lived there
08:52:15 25 that whole time. It's just his family didn't move in

08:52:19 1 until 2006. Are you now correcting the correction?

08:52:23 2 A. No, we never said that, he lived there full-time
08:52:26 3 in 2005. He didn't do that. He was there. Maybe
08:52:32 4 there was some misunderstanding. But that's not what I
08:52:34 5 was trying to say then. And never did. He moved in
08:52:40 6 in 2006 where he actually lived there with the family.

08:52:46 7 Q. You were under oath at the time of your
08:52:48 8 deposition; were you not?

08:52:49 9 A. Yes.

08:52:55 10 Q. Are you able to read that on your screen?

08:52:57 11 A. Yeah, I think so. Let me put my glasses on.

08:53:03 12 THE COURT: You might want to zoom it.

08:53:16 13 A. Yeah, now, is this the --

08:53:18 14 THE COURT: Here's how we're going to do
08:53:20 15 this. This is the proper way, ladies and gentlemen.
08:53:22 16 Mr. Bahret, you may ask the witness or you may recite to
08:53:25 17 him the question and the answer.

08:53:27 18 And, Mr. McCarthy, you can either say yes,
08:53:29 19 that's what I testified to; or no, that's not what I
08:53:33 20 testified. This is will help the process move along.

08:53:38 21 MR. BAHRET: I don't know how to work this
08:53:40 22 thing. I didn't put that arrow there?

08:53:42 23 THE COURT: You touched. Somebody touched.

08:53:46 24 MR. BAHRET: What do I touch to make it go
08:53:48 25 off?

08:53:48 1 THE COURT: Touch the erase button.

08:53:51 2 Did you touch it, Mr. McCarthy?

08:53:54 3 THE WITNESS: I didn't touch anything.

08:53:55 4 THE COURT: That's okay. That's what it's
08:53:58 5 there for.

08:54:03 6 THE WITNESS: I brushed it with my finger.

08:54:07 7 MR. BAHRET: How did you do that?

08:54:12 8 THE COURT: When the witness touches the
08:54:13 9 screen, an arrow or mark will show.

08:54:27 10 BY MR. BAHRET:

08:54:27 11 Q. You're able to read the question there? When I
08:54:30 12 asked you at deposition: "When did your son move into
08:54:32 13 that house in the development?"

08:54:33 14 And your answer was: "He moved in there, it must
08:54:36 15 have been sometime in 2005."

08:54:38 16 Do you see that?

08:54:39 17 A. Yes.

08:54:40 18 Q. And you're trying to correct that now. Further
08:54:45 19 down here, sir --

08:54:50 20 MR. BAHRET: Do you know how to get rid of
08:54:52 21 that yellow dot?

08:54:55 22 THE COURT: Hit your screen, Mr. McCarthy.

08:55:01 23 MR. BAHRET: I see that. I'm learning.

08:55:03 24 BY MR. BAHRET:

08:55:03 25 Q. Further down here: "Do you know how long he was

08:55:07 1 there before this clearing took place?"

08:55:11 2 Again, you say: "I would say he was there most
08:55:14 3 of that year, most of 2005."

08:55:18 4 Then you further clarify and say, "You don't know
08:55:21 5 if it was a whole year, but it was approximately a year
08:55:23 6 before the clearing?"

08:55:24 7 A. Yes.

08:55:26 8 Q. All right. And you believe that testimony is
08:55:29 9 inaccurate now?

08:55:30 10 A. I thought this was what we corrected back then at
08:55:32 11 the deposition. I thought after I talked to him, he
08:55:36 12 told me he wasn't -- they didn't move in until 2006. I
08:55:42 13 thought we had it corrected. He was only there off and
08:55:44 14 on in 2005, and was there off and on in 2005 with things
08:55:49 15 other than him actually living there.

08:55:51 16 Q. Okay. Let me show you another page. During the
08:56:09 17 break in the deposition you had a telephone call with
08:56:12 18 your son, correct?

08:56:13 19 A. Yes.

08:56:14 20 Q. And after that you came in and told me your
08:56:18 21 grandson wasn't there until 2006. Do you see that?

08:56:23 22 A. Yes.

08:56:24 23 Q. You didn't tell me your son?

08:56:26 24 A. Right. I should have said that.

08:56:35 25 Q. Well, in any event, whether he lived there or

08:56:38 1 not, you saw the property in 2005?

08:56:41 2 A. Briefly.

08:56:44 3 Q. And why did you have contact with that house or
08:56:47 4 that property before your son moved in? I'm not
08:56:52 5 following that.

08:56:54 6 A. The one thing I can remember -- now, this is
08:56:57 7 2005. The one thing I can remember, before -- I believe
08:57:00 8 it was before they moved in. We had stored a car over
08:57:05 9 there. The garage was empty. We put a car in there,
08:57:10 10 and going back and forth with that.

08:57:12 11 Q. Your car? Your son's car? Whose car?

08:57:14 12 A. My car.

08:57:15 13 Q. Okay?

08:57:16 14 A. And we've been over there for that. I think he
08:57:21 15 showed me the house that he was going to -- that he was
08:57:25 16 going to move into. I think I was over there for that.
08:57:29 17 Those kind of reasons. But we weren't -- didn't move
08:57:33 18 in there, weren't really evaluating the place. Might
08:57:36 19 have helped doing some repairs on the house, little
08:57:39 20 things that it needed. But I wasn't there very often.

08:57:42 21 Q. Let me modify my question then. Whether your
08:57:45 22 son lived there or not, the house existed for roughly a
08:57:49 23 year before the land was cleared?

08:57:54 24 A. Yes. I'm not sure exactly when the house was
08:57:57 25 built, but at least a year.

08:57:59 1 Q. At least a year?

08:58:00 2 A. Yeah.

08:58:00 3 Q. And you know it was a spec house?

08:58:04 4 A. Yes, it was a spec house, and it was the sales
08:58:08 5 office.

08:58:09 6 Q. And you know it did not sell, correct?

08:58:14 7 A. It was vacant at the end of 2005, 2006.

08:58:19 8 Q. It was available for sale, and nobody bought it?

08:58:22 9 A. That's right.

08:58:24 10 Q. Nobody even made an offer on it?

08:58:26 11 A. That, I don't know.

08:58:32 12 Q. And it's still available for sale now, or don't
08:58:35 13 you know?

08:58:37 14 A. I believe it's -- my son, basically what he
08:58:41 15 considers renting it. And it's for sale, yes, as far
08:58:47 16 as I know.

08:58:48 17 Q. Let's get to the City job. You had no part in
08:58:52 18 planning the City of Toledo water project?

08:58:55 19 A. No, I did not.

08:58:56 20 Q. And obviously, I think it's already clear, but
08:58:59 21 you had no part in developing or building Cambridge?

08:59:01 22 A. That's right.

08:59:03 23 Q. Your first part in this project, if I can call it
08:59:08 24 your part in the project, sir, was after the land had
08:59:11 25 already been cleared?

08:59:14 1 A. You're talking about the railroad property? Yes.
08:59:21 2 I mean, it wasn't done in one day, but yes. During and
08:59:26 3 after the clearing of the --

08:59:30 4 Q. I mean, you didn't see any part of the clearing
08:59:32 5 being done physically, did you?

08:59:37 6 A. No, I don't believe I ever -- I don't think I
08:59:43 7 ever saw the actual machines moving. I saw the
08:59:45 8 machines out there afterwards. But I did not actually
08:59:50 9 see the clearing that I can remember.

08:59:54 10 Q. All right. And my understanding is after the
09:00:00 11 area behind Cambridge had been cleared, you went out
09:00:03 12 there and looked around, correct?

09:00:07 13 A. Yes. After it started.

09:00:09 14 Q. And you no longer saw any survey stakes or laths?
09:00:17 15 If there were any there, they were gone?

09:00:19 16 A. The first time I went out there?

09:00:21 17 Q. Right.

09:00:21 18 A. As I recall there was not any lath. There was
09:00:25 19 some ribbons in the trees every 100 feet or something.
09:00:32 20 We saw a couple ribbons. I think we mentioned that
09:00:35 21 somewhere.

09:00:35 22 Q. You did.

09:00:36 23 A. And some paint on the ground perhaps.

09:00:42 24 Q. Do you know enough about surveying to verify
09:00:44 25 sometimes that's how markings are made? If I'm going

09:00:52 1 to try to mark a boundary, I could do it with a ribbon
09:00:54 2 tied to a tree just as well as with a stake in the
09:00:58 3 ground? Or don't you know?

09:01:00 4 A. We did a lot of -- I've done a lot -- with the
09:01:04 5 Corps of Engineers we did a lot of clearing. So yes,
09:01:07 6 we're very much into the details. It's not -- that's
09:01:10 7 not the common way of marking it for when you're at a
09:01:14 8 property line.

09:01:15 9 Q. Well, if it's a common way or not, would you
09:01:18 10 agree with me that those marks that you saw, the painted
09:01:21 11 mark, the ribbons, all of them were at the border and
09:01:26 12 not encroaching on Cambridge?

09:01:29 13 A. At the time I first saw it?

09:01:32 14 Q. Yes.

09:01:33 15 A. Those markings, they were near the boundary.
09:01:40 16 That's all I could say. Because we didn't have any way
09:01:42 17 to tie them in. Most of it was just -- a ribbon in a
09:01:48 18 tree hadn't been knocked down, blowing around. It was
09:01:51 19 near the boundary. That's all I can say.

09:01:53 20 Q. Did you see any markings that you believed were
09:01:55 21 on the development property?

09:01:58 22 A. No. I could not verify that.

09:02:01 23 Q. Okay. So everything you saw you were of the
09:02:03 24 opinion that they were either on railroad property or on
09:02:06 25 the border, on the property line?

09:02:10 1 A. They were near the line. That doesn't mean they
09:02:12 2 were not on Cambridge property, not on the railroad
09:02:15 3 property. They were near the line. All we saw was
09:02:18 4 these --

09:02:20 5 Q. And that's what you were trying to determine?

09:02:21 6 A. Right. I didn't -- at that time I didn't even
09:02:24 7 know where the corner monuments were. I hadn't gone
09:02:27 8 that far.

09:02:28 9 Q. Well, sir, do you deny telling me after you had a
09:02:33 10 year and a half to study the problem, you told me that
09:02:37 11 none of those markings were encroaching on the
09:02:41 12 development?

09:02:43 13 A. That's what I meant. It was on the borderline.
09:02:47 14 There wasn't any -- nothing I could confirm that was on
09:02:50 15 the development.

09:02:51 16 Q. And you stand by that testimony today?

09:02:54 17 A. I will stand by that testimony today.

09:02:56 18 Q. Thank you. Do you believe Cambridge has a
09:03:08 19 self-contained drainage plan?

09:03:10 20 A. Yes, we do.

09:03:12 21 Q. When did you come up with that belief? Because
09:03:15 22 that may be another area in your deposition that you may
09:03:18 23 have noted.

09:03:20 24 A. Well, when we first started building this mound,
09:03:25 25 and that era, which would have been in the end of April,

09:03:34 1 May, beginning of May.

09:03:35 2 Q. The question is, when did you come up with the
09:03:38 3 conclusion? I don't need a history.

09:03:41 4 A. In May. Early, yeah.

09:03:43 5 Q. May of what year?

09:03:44 6 A. 2006.

09:03:47 7 Q. So are you now saying that the manhole on the
09:03:50 8 railroad property is or is not part of the drainage plan
09:03:54 9 for Cambridge?

09:03:56 10 A. No, it's not. The self-contained -- it's not
09:04:00 11 part of the self-contained drainage system of Cambridge.

09:04:15 12 Q. This is page 30 to your deposition. Are you
09:04:20 13 able to read it?

09:04:21 14 A. Yes.

09:04:22 15 Q. And you'll see that I very clearly asked you
09:04:25 16 questions about that manhole including: "What
09:04:29 17 information do you rely upon to claim that the manhole
09:04:33 18 that isn't even on Cambridge property is part of the
09:04:36 19 drainage plan for Cambridge?" Do you see that?

09:04:41 20 A. Yes.

09:04:41 21 Q. You clearly were telling me it's part of the
09:04:44 22 drainage plan, right?

09:04:45 23 A. Of the overall scheme for the region that
09:04:49 24 Cambridge is in. It's not part of -- it's not
09:04:52 25 connected with the Cambridge system. It's separate.

09:04:56 1 It has to be separate when you develop an area. It has
09:04:59 2 to be separate. It went out to River Road.

09:05:21 3 Q. You know that the culvert that goes behind
09:05:25 4 Cambridge on the railroad property is there to drain the
09:05:28 5 railroad water?

09:05:34 6 A. And other water, yes.

09:05:36 7 Q. And you know that the culvert -- I guess maybe we
09:05:48 8 should define that term. I might call it a pipe. And
09:05:51 9 it's actually called a culvert, correct?

09:05:54 10 A. The railroad calls it a culvert. Most
09:05:57 11 engineers, if it's a general pipe for a general drainage
09:06:01 12 area, yes, they usually call it a culvert or a storm
09:06:05 13 drain, main storm drain.

09:06:13 14 Q. You might need to come over here, sir, so you can
09:06:17 15 see where I'm pointing. It begins somewhere here.

09:06:29 16 A. Yes.

09:06:31 17 Q. And it's underground?

09:06:35 18 MR. ROBON: The jury can't see.

09:06:37 19 THE COURT: If you want to stand, jury, will
09:06:41 20 that help? Or if you want to move your seat, you may.

09:06:50 21 MR. ROBON: Yeah, let's do that because this
09:06:53 22 thing is blocking her. Is that observable for everybody
09:07:16 23 now?

09:07:19 24 BY MR. BAHRET:

09:07:19 25 Q. The culvert, in laymen's terms, Mr. McCarthy, we

09:07:23 1 could call that a pipe?

09:07:24 2 A. Yes. I call it a pipe.

09:07:25 3 Q. All right. The pipe begins somewhere towards
09:07:29 4 the middle of Old Granite?

09:07:32 5 A. This is what they call the culvert, the
09:07:35 6 crossover. This they never called a culvert. This is
09:07:38 7 just -- this is just a pipe that leads --

09:07:42 8 Q. It's a solid, enclosed --

09:07:44 9 A. It's a solid clay pipe.

09:07:46 10 Q. It doesn't have holes in it that would allow
09:07:50 11 water to enter it?

09:07:51 12 A. Just at the end.

09:07:52 13 Q. And it ends somewhere down here? You don't know
09:07:56 14 where the end is here, do you?

09:07:57 15 A. Yes.

09:07:58 16 Q. Do you?

09:07:58 17 A. Yes.

09:07:59 18 Q. So it's somewhere, I don't know, how many feet?

09:08:01 19 A. A couple hundred feet down this way.

09:08:03 20 Q. A couple hundred feet?

09:08:04 21 A. Yes.

09:08:05 22 Q. Roughly what's the dimension from this manhole
09:08:08 23 down here?

09:08:09 24 A. This is all 12-inch diameter.

09:08:11 25 Q. I mean the length. What's the length? The

09:08:15 1 distance from here to here?

09:08:17 2 A. This was 250, 350 feet.

09:08:19 3 Q. So for 250 to 300 feet, from here to there, and
09:08:25 4 what did you tell me? I forgot.

09:08:27 5 A. A couple hundred feet. 200.

09:08:29 6 Q. So we've got, like, 500 feet or more of enclosed
09:08:32 7 pipe?

09:08:33 8 A. Yes.

09:08:34 9 Q. And at least before you did something, no water
09:08:38 10 could enter or get out of that pipe to get on this
09:08:42 11 property, correct?

09:08:48 12 A. Not in those pipes.

09:08:49 13 Q. Okay.

09:08:50 14 A. And I --

09:08:52 15 Q. All right. You've answered the question.

09:08:53 16 I mean, water isn't going to come, if this
09:08:55 17 manhole is full of water, it isn't going to come out and
09:09:00 18 be sitting around here; am I correct? Am I correct?

09:09:08 19 A. No, I don't think so.

09:09:09 20 Q. How would it get out?

09:09:11 21 A. This -- one thing we never were able to do,
09:09:15 22 whether this also has any kind of a leak down in this
09:09:19 23 basin, I do not know. These are clay pipes. Even
09:09:26 24 though they're not gasketed, this is that kind of thing,
09:09:29 25 there is some drainage, and that was the beauty of this

09:09:32 1 old railroad system, you get some drainage down in here.

09:09:39 2 Q. You have to rely on an assumption that it was
09:09:43 3 broken then?

09:09:44 4 A. No, just the joints themselves. They didn't seal
09:09:47 5 them in those old days. They're only short pieces.
09:09:51 6 It is somewhat like a --

09:09:53 7 Q. Well, you enhanced the situation by tapping into
09:09:56 8 that pipe and putting some sort of flexible pipe over
09:10:01 9 here, correct?

09:10:02 10 A. That's right. Because we had --

09:10:04 11 Q. And so now that very clearly would allow water
09:10:08 12 that's in this thing or coming from here getting into
09:10:12 13 this catch basin, that very clearly let it get out and
09:10:16 14 sit right here on this land; would it not?

09:10:19 15 A. Right, because we're replacing --

09:10:20 16 Q. Would it not?

09:10:21 17 A. Yes.

09:10:22 18 Q. Thank you. You can go ahead and have your seat.

09:10:52 19 Sir, did you have permission from the railroad to
09:10:55 20 go on their property and do that?

09:10:59 21 A. To go on their property to make that connection?

09:11:03 22 Q. Yeah.

09:11:04 23 A. No, we did not.

09:11:05 24 Q. So you trespassed on the railroad property,
09:11:11 25 knocked a hole in the railroad pipe, put some sort of

09:11:15 1 connector so that water can come out of that pipe, all
09:11:19 2 without anybody's permission, correct?

09:11:22 3 MR. ROBON: Objection.

09:11:26 4 THE COURT: Grounds?

09:11:27 5 MR. ROBON: The use of the word trespass.
09:11:30 6 Trespass is an intentional act.

09:11:33 7 MR. BAHRET: Did he accidentally do it?

09:11:35 8 THE COURT: Well, lawyers, let's keep your
09:11:38 9 conversation with me, please.

09:11:45 10 Why don't you rephrase the question or break
09:11:48 11 it up.

09:11:49 12 MR. BAHRET: All right.

09:11:50 13 BY MR. BAHRET:

09:11:50 14 Q. First of all, you knew that pipe was on railroad
09:11:52 15 property, correct?

09:11:54 16 A. Yes, I did.

09:11:55 17 Q. And so you knew that you were entering railroad
09:11:58 18 property; did you not?

09:12:00 19 A. Yes, I did.

09:12:01 20 Q. You knew that you did not have permission to do
09:12:03 21 so?

09:12:06 22 A. Not quite true.

09:12:08 23 Q. You thought you had permission to go in there and
09:12:11 24 tap into their pipe?

09:12:12 25 A. As we discussed before --

09:12:15 1 Q. I don't recall discussing any permission to tap
09:12:18 2 into a pipe.

09:12:19 3 A. No, about access to their property, and we were
09:12:22 4 not going to make any significant change to it. I sent
09:12:25 5 CSX a letter telling them that we were building a mound,
09:12:29 6 that we were going to be temporarily using their
09:12:34 7 property, that we were going to be not having any --

09:12:38 8 Q. Let's get this straight.

09:12:41 9 MR. ROBON: Your Honor, can I let the
09:12:42 10 witness finish the answer, please?

09:12:44 11 THE COURT: No, you can't. I can.

09:12:45 12 MR. ROBON: That's what I meant. Would
09:12:47 13 you, please.

09:12:53 14 THE COURT: Let's pick it up again. I'm
09:12:57 15 going to ask the lawyer to ask snappy questions, and I'm
09:13:01 16 going to ask the witness to give snappy answers to the
09:13:04 17 extent you can, okay. And I think by breaking it up
09:13:07 18 this way, we can get the testimony quicker.

09:13:12 19 BY MR. BAHRET:

09:13:13 20 Q. The letter you're talking about, sir, you sent a
09:13:15 21 letter to somebody at CSX saying you'd like to enter the
09:13:18 22 property to move dirt?

09:13:20 23 A. That we would be in there.

09:13:22 24 Q. To move dirt?

09:13:23 25 A. Move dirt and do other things, but we were not

09:13:25 1 going to permanently impact their -- the railroad by
09:13:30 2 doing this. And didn't specifically say that we were
09:13:34 3 going to tap into this pipe.

09:13:35 4 Q. You never even mentioned the pipe?

09:13:38 5 A. Never mentioned the pipe.

09:13:39 6 Q. And you didn't ask permission to do anything to
09:13:41 7 their drainage system, did you?

09:13:45 8 A. I did not.

09:13:47 9 Q. And you never got a reply to that letter either?

09:13:51 10 A. I told them we were going ahead.

09:13:53 11 Q. You never got a reply?

09:13:54 12 A. They never replied.

09:13:56 13 Q. So they didn't say, okay, Mr. McCarthy, go ahead
09:13:59 14 and do whatever you want to do on our land?

09:14:03 15 A. If they don't reply --

09:14:05 16 Q. Can you say yes or no?

09:14:06 17 A. Yes or -- no, they never replied.

09:14:49 18 Q. Sir, do you remember telling me that you spoke
09:14:51 19 with the guy that designed the Cambridge drainage plan
09:14:55 20 and he told you that Cambridge relies upon the railroad
09:15:00 21 pipe and manhole?

09:15:03 22 A. Yes.

09:15:04 23 Q. And do you stand by that testimony?

09:15:07 24 A. I'm not sure that was exactly what I said, but --

09:15:15 25 Q. I asked you: "What document do you have that

09:15:18 1 shows that Old Granite relied upon any drainage ditches
09:15:23 2 or pipes or manholes that weren't on Old Granite
09:15:26 3 property?"

09:15:28 4 And you told me you spoke to the engineer that
09:15:31 5 designed it.

09:15:32 6 I asked, "Who is that?"

09:15:33 7 You said, "Todd Perkins -- or Jenkins."

09:15:37 8 Do you remember that now?

09:15:38 9 A. Yeah, but that wasn't exactly what I said or
09:15:42 10 remembered about it. Todd Jenkins wasn't the actual
09:15:46 11 designer. I did speak to Todd Jenkins.

09:15:49 12 Q. Actually, he was.

09:15:50 13 A. He did some of the -- he did have some knowledge
09:15:53 14 of the project. He was the designer's boss. He did
09:15:56 15 say that the Cambridge system was designed to take care
09:16:04 16 of the rainfall that fell on Cambridge. They understood
09:16:10 17 that, as far as he knew, that they still relied on the
09:16:14 18 ditch in the back to take water past -- the rainwater
09:16:19 19 from Hospice and that area past --

09:16:23 20 Q. Could we just confine your answer to what I
09:16:25 21 asked?

09:16:26 22 A. That's what I was trying to do.

09:16:28 23 MR. ROBON: Your Honor, could we let the
09:16:29 24 witness finish?

09:16:30 25 THE COURT: We were getting a bit far afield

09:16:33 1 here. I go back to let's have the questions be as
09:16:38 2 short as we can, and let's have the answers be as
09:16:41 3 responsive to the question as we can.

09:16:44 4 BY MR. BAHRET:

09:16:44 5 Q. And, sir, you mentioned something; you believe
09:16:48 6 Todd Jenkins is the boss of whoever designed the
09:16:51 7 drainage plan?

09:16:53 8 A. That's what he told me, yes.

09:16:54 9 Q. So I guess you're not aware of the fact that Todd
09:16:58 10 Jenkins is the man that designed the drainage plan and
09:17:00 11 that Nick Nigh is his boss?

09:17:05 12 A. No, that's not -- that's not my understanding of
09:17:08 13 the situation there.

09:17:09 14 Q. Well, Mr. Nigh was just here yesterday and said
09:17:12 15 he's the president of the company.

09:17:13 16 A. He's a partner in the company.

09:17:15 17 Q. He said he's the president?

09:17:16 18 A. Well, that -- that may be. And he may be Todd
09:17:21 19 Jenkins' boss. But he's not an engineer. He's a
09:17:26 20 surveyor. He's a professional surveyor. He's an
09:17:30 21 engineer, but not in the design thing. Todd Jenkins
09:17:33 22 was doing that. Todd Jenkins told me --

09:17:36 23 Q. I didn't ask you what Todd Jenkins said. But
09:17:40 24 you are apparently now agreeing Todd Jenkins is the
09:17:44 25 engineer that designed it?

09:17:47 1 A. That's not what he told me. He at least had
09:17:50 2 somebody helping him that did the actual details like
09:17:53 3 we're talking about here.

09:17:54 4 Q. Okay. Whatever. We'll let him speak to that.
09:17:59 5 We've already covered this thing. You told me that you
09:18:02 6 thought the ditch between the railroad beds was 12 to 13
09:18:05 7 feet deep. You corrected that. You know now it's not
09:18:09 8 that deep, correct?

09:18:09 9 A. Right.

09:18:10 10 Q. Did you ever actually measure anything in the
09:18:19 11 manhole?

09:18:19 12 A. Yes.

09:18:19 13 Q. I mean measure depths and things.

09:18:22 14 A. Yes, we measured from the top of the rim of the
09:18:24 15 manhole like we talked about yesterday.

09:18:26 16 Q. You measured yesterday?

09:18:29 17 A. No, that we talked about yesterday.

09:18:31 18 Q. And when did you do these measurements?

09:18:34 19 A. I did the measurements back in 2006. And then
09:18:41 20 we redid them every time this came up, and the manhole
09:18:48 21 was repaired, and then we went -- I was down in there,
09:18:53 22 like I said yesterday, I was down there several times,
09:18:56 23 and I measured at least twice.

09:18:57 24 Q. Did you write these measurements down?

09:18:59 25 A. Yes.

09:19:00 1 Q. What did you measure?

09:19:02 2 A. We measured from the top of the rim --

09:19:04 3 Q. Bad question. What were the measurements?

09:19:07 4 A. Seven and a half feet.

09:19:08 5 Q. To what?

09:19:09 6 A. To the bottom of the pipe, from the top of the
09:19:11 7 manhole.

09:19:12 8 Q. Seven and a half feet from the top of the
09:19:14 9 manhole --

09:19:14 10 A. Right.

09:19:15 11 Q. -- to the bottom of --

09:19:16 12 A. Bottom of the pipe, the culvert that goes across.

09:19:19 13 Q. That crossover thing?

09:19:21 14 A. Yes.

09:19:21 15 Q. And the top of the manhole that you measured from
09:19:25 16 sticks above ground, correct?

09:19:27 17 A. Yes -- yes, right. Just a little bit above
09:19:31 18 ground.

09:19:31 19 Q. Did you measure how much it sticks up above the
09:19:35 20 ground?

09:19:35 21 A. It's actually two feet below the railroad bed.
09:19:41 22 It's below the ground that we talked about here. The
09:19:51 23 railroad bed had a crown on it, so it comes up. Even
09:19:55 24 though it does stick out a little bit.

09:20:00 25 Q. Would you agree with me, sir, that lots 15 and

09:20:03 1 16, their water cannot drain into that pipe that's on
09:20:07 2 the railroad property?

09:20:13 3 A. Well, now it can't. It has no place to go.

09:20:18 4 Q. The water that we see here on Plaintiff's Exhibit
09:20:25 5 37 could not get into that pipe, correct?

09:20:35 6 A. Well, we have -- as you saw yesterday, there is a
09:20:39 7 pipe that leads right it to. It can get in there now,
09:20:42 8 but it can't go anyplace.

09:20:44 9 Q. Would you agree with me that it could not get in
09:20:46 10 that pipe before you did your little fix?

09:20:51 11 A. I think that's what we just talked about before.
09:20:54 12 It would be slow. We did not confirm there was any
09:20:57 13 other -- there may be some other entrance in there.
09:21:01 14 But, you know, I don't know. I don't know what --

09:21:05 15 Q. The other entrance, if there is one, there's a
09:21:09 16 crack in the pipe or something like that?

09:21:10 17 A. No, there may be some other entrance there.

09:21:13 18 Q. You don't know if there's any entrance there?

09:21:15 19 A. I don't know if there's anything like that.

09:21:17 20 Q. Would you agree with me at your deposition you
09:21:19 21 told me the water on lots 15 and 16 cannot drain into
09:21:24 22 that pipe?

09:21:24 23 A. Yes.

09:21:25 24 Q. Why didn't you mention that little thing that you
09:21:27 25 put in there during your deposition?

09:21:29 1 A. I think, I did. I think in the later questions.

09:21:36 2 Q. Well, when I asked you point blank: "Could the
09:21:38 3 water from those two lots get into that pipe?" You
09:21:43 4 specifically say, no.

09:21:46 5 A. Right.

09:21:46 6 Q. Right.

09:21:48 7 A. I guess -- you know, I must have been talking
09:21:53 8 about -- I don't know what the timeframe was. Maybe
09:21:55 9 that was before. But it can get into that pipe. It
09:21:58 10 can't go out through. That's what I'm talking about.

09:22:01 11 Q. The question -- you're a big boy; you're a
09:22:04 12 trained engineer, college graduate, right?

09:22:06 13 A. Yes, I am.

09:22:07 14 Q. And you know what the English language is and you
09:22:10 15 understood the question?

09:22:10 16 A. Yes.

09:22:11 17 Q. And that's what you told me.

09:22:14 18 A. And it's essentially true.

09:22:19 19 Q. Now, would you agree, at some point yesterday I
09:22:23 20 think you said you called a meeting or asked for a
09:22:26 21 meeting, and ray Huber participated, Christy
09:22:32 22 participated, and Dean Walsh from Ric-man participated?

09:22:38 23 A. That's right.

09:22:39 24 Q. And there was discussion about that crossover
09:22:42 25 pipe?

09:22:43 1 A. That's right.

09:22:44 2 Q. And during that discussion, Mr. Huber indicated
09:22:48 3 that he believed the water was moving from the railroad
09:22:54 4 through the crossover pipe towards the private property,
09:22:58 5 correct?

09:22:59 6 A. No.

09:23:00 7 Q. Well, he testified that's what he said. Do you
09:23:03 8 disagree?

09:23:04 9 A. Yes.

09:23:05 10 Q. Okay.

09:23:06 11 A. He wasn't that specific at the meeting that I
09:23:09 12 recall.

09:23:10 13 Q. What you recall is that he said something more to
09:23:13 14 the effect, I don't know which way the water goes?

09:23:15 15 A. He was very emphatic that he didn't study this
09:23:18 16 thing. He didn't really know, but perhaps it goes this
09:23:22 17 way, you know. I don't know.

09:23:24 18 Q. Well, he testified yesterday that he told Christy
09:23:27 19 Soncrant that the water moved from the railroad towards
09:23:31 20 private property, and that he never told her anything
09:23:34 21 different. Do you disagree with that?

09:23:39 22 THE COURT: Disagree with what he told her?

09:23:43 23 MR. BAHRET: Yes.

09:23:44 24 Q. I mean, disagree with the fact he told her that?

09:23:47 25 A. No, I don't really know what he denied. But,

09:23:52 1 whatever.

09:23:53 2 Q. During the meeting, there was discussion about
09:23:56 3 the crossover drain appeared to be plugged, correct?

09:24:02 4 A. At this early stage, I'm not sure we were --
09:24:10 5 anybody was aware of how plugged it was or whether it
09:24:15 6 was plugged.

09:24:16 7 Q. Was there discussion? You can really speed this
09:24:18 8 up with a yes or no. Do you recall?

09:24:21 9 A. No, I don't recall.

09:24:23 10 Q. Okay. At some point was there discussion that
09:24:26 11 you participated in about that crossover pipe being
09:24:29 12 plugged?

09:24:30 13 A. Yes.

09:24:32 14 Q. And, in fact, I think you alluded to that
09:24:34 15 yesterday when you said that Dean Walsh -- or you didn't
09:24:39 16 use a name, but you said the guy from Ric-man and the
09:24:42 17 City engineer -- and there was somebody there from the
09:24:46 18 railroad also, wasn't there?

09:24:50 19 A. Another meeting we met with someone from the
09:24:53 20 railroad.

09:24:53 21 Q. And all of those folks were saying, although you
09:24:57 22 disagreed with it, all of these folks were saying that
09:25:00 23 pipe served no function anymore. Is that right?

09:25:09 24 A. No. Ray Huber said he didn't know. That was
09:25:13 25 his main thing. He didn't really know.

09:25:15 1 Q. The rest of them said they believed it served no
09:25:19 2 function, correct?

09:25:20 3 A. No. I don't think that's true either because
09:25:23 4 Christy never really said that she believed that. She
09:25:28 5 just was telling me that's what Ric-man thought, that
09:25:32 6 this thing was plugged.

09:25:33 7 Q. Just yesterday you testified that the City took
09:25:35 8 the position it served no purpose and that Ric-man
09:25:38 9 said --

09:25:40 10 A. From Ric-man. Didn't say -- we're talking about
09:25:43 11 this meeting with her. I don't think that was her
09:25:45 12 personal thing, that she knew anything about it or said
09:25:48 13 that.

09:25:49 14 Q. Sir, you know the railroad is aware that that
09:25:51 15 pipe was cut, correct? You know that from your
09:25:54 16 conversations?

09:25:57 17 A. Yeah, the railroad now knows that that was cut.

09:26:00 18 Q. And are you aware of the fact that the railroad
09:26:03 19 has not to this day asked for anything to be done about
09:26:06 20 that pipe?

09:26:07 21 MR. ROBON: Objection.

09:26:09 22 BY MR. BAHRET:

09:26:10 23 Q. Their pipe.

09:26:10 24 MR. ROBON: No evidence of that.

09:26:12 25 MR. BAHRET: There will be.

09:26:14 1 A. I don't believe the railroad has or hasn't
09:26:16 2 done --

09:26:16 3 THE COURT: Overruled. The answer may
09:26:20 4 stand.

09:26:27 5 Q. Sir, you know that Old Granite was basically a
09:26:30 6 farm -- I said Old Granite. I'm sorry. Cambridge was
09:26:34 7 basically a farm before it became a development?

09:26:37 8 A. That was what I was told by a neighbor.

09:26:40 9 Q. And you estimated that there may have been as
09:26:44 10 much as 100 feet thick of vegetation behind Old Granite,
09:26:50 11 correct?

09:26:50 12 A. Yes.

09:26:51 13 Q. But all of it was on railroad property?

09:26:56 14 A. Not all of it was on railroad property. What
09:27:03 15 was everything we did yesterday?

09:27:18 16 Q. Page 61 of your deposition, sir. You see the
09:27:28 17 question there and the answer? I asked you: "You're
09:27:32 18 not claiming there was 100 feet of vegetation on Old
09:27:35 19 Granite's property?"

09:27:37 20 And your answer: "No. No. No. Old Granite
09:27:40 21 was basically a farmland. It was cleared. There was a
09:27:46 22 couple of trees that were there. They're grown-up,
09:27:49 23 whatever. But that was basically cleared. This 100
09:27:53 24 feet of vegetation was between" --

09:27:56 25 And then I interrupted you: "It was on railroad

09:27:59 1 property?"

09:28:00 2 And you continued your answer: " On railroad
09:28:04 3 property that was cut down."

09:28:06 4 Do you see that?

09:28:07 5 A. Yes.

09:28:07 6 Q. Did you mean to tell me that?

09:28:10 7 A. I thought we all at that point were clear that
09:28:13 8 this little boundary was not, you know, was still under
09:28:20 9 doubt. Not that this whole thing was -- I didn't mean
09:28:24 10 that like that. But that's what I said.

09:28:28 11 Q. You didn't come into that deposition blind sided.
09:28:31 12 You came in preparing, reviewing your note, studying --

09:28:35 13 A. Right.

09:28:35 14 Q. -- and talking to Mr. Robon; did you not?

09:28:37 15 A. Yes.

09:28:38 16 Q. You were prepared to be asked questions by the
09:28:41 17 battery of attorneys that were sitting there in front of
09:28:44 18 you, including me?

09:28:47 19 A. Right. But all I'm saying is there were trees
09:28:50 20 cut on railroad property.

09:28:52 21 Q. 100 feet thick?

09:28:54 22 A. Yes, 100 feet thick.

09:28:56 23 Q. And --

09:29:00 24 A. Plus what was on our property. I didn't say
09:29:02 25 that.

09:29:03 1 Q. Do you see where I just put the arrows, that part
09:29:07 2 of your answer?

09:29:08 3 A. Yes.

09:29:08 4 Q. When you're talking about Old Granite, and we
09:29:12 5 should have been using the word Cambridge.

09:29:14 6 A. This, I was referring to away from that boundary
09:29:16 7 that was back to our property. I wasn't talking about
09:29:19 8 this disputed little stretch there.

09:29:21 9 Q. You tell me there: "There was a couple of trees
09:29:24 10 that were there. They're grown-up, and they're" --
09:29:30 11 you're referring to Cambridge, right?

09:29:32 12 A. Right.

09:29:32 13 Q. "A couple of trees." But you told the jury today
09:29:35 14 thousands.

09:29:36 15 A. No, I was talking about away from this disputed
09:29:39 16 area on Cambridge property that was there that was a
09:29:43 17 farmland, there were a few trees left after the farmland
09:29:48 18 was there. Not in the disputed borderline. I didn't
09:29:53 19 mean that. Sorry.

09:30:04 20 Q. You're aware of the fact the housing market
09:30:06 21 really is on rough times?

09:30:09 22 A. Yes, I am.

09:30:10 23 Q. You're aware of the fact that the housing market
09:30:13 24 really went into the toilet right around the time the
09:30:17 25 right-of-way was cleared?

09:30:22 1 A. My opinion of it was it was a little bit later in
09:30:25 2 Perrysburg. I was working for another developer at the
09:30:29 3 time.

09:30:29 4 Q. Well, you'd say the middle of 2006, right?

09:30:31 5 A. Right.

09:30:32 6 Q. And that's when this project was, correct?

09:30:38 7 A. Well, this clearing, we said, was in April.

09:30:43 8 Q. And a month or two later the housing market takes
09:30:46 9 a real nosedive?

09:30:48 10 A. Five or six months, four months, whatever.

09:30:51 11 Q. Did you tell me the middle of '06 at deposition?

09:30:54 12 A. Yes.

09:30:55 13 Q. Do you want me to pull the page out?

09:30:57 14 A. Well, August of -- that would be the middle of
09:31:03 15 '06. That's what I meant. But it was a few months
09:31:06 16 after this.

09:31:07 17 Q. All right. In your mind August is the middle of
09:31:10 18 the year?

09:31:11 19 A. Yes.

09:31:11 20 Q. I thought it was June 30 to July 1, but you're
09:31:15 21 the engineer.

09:31:19 22 You would agree that you did not specialize in
09:31:21 23 drainage or subdivision drainage plans when you worked
09:31:24 24 for the Corps?

09:31:27 25 A. No, we specialized in flooding, evaluating, these

09:31:32 1 things.

09:31:32 2 Q. Would you agree that you did not specialize in
09:31:35 3 drainage and subdivision drainage plans?

09:31:37 4 A. Yes, I would agree with that.

09:31:40 5 Q. Would you agree that your primary task when you
09:31:43 6 worked for the Corps of Engineers was construction
09:31:46 7 administration?

09:31:50 8 A. Half and half.

09:31:51 9 Q. Would you agree it was your primary task?

09:31:55 10 A. One of my primary tasks. I was also an
09:31:59 11 engineer. It's a small office; you have to do the
09:32:02 12 engineering as well, the hands-on engineering. That
09:32:04 13 was certainly as much as the administration time-wise.

09:32:11 14 Q. Changing subjects. After you brought complaints
09:32:15 15 to the City's attention, the City did send a survey crew
09:32:18 16 out and put markings in; did they not?

09:32:21 17 A. The first time, no. They just sat there with
09:32:26 18 their GPS.

09:32:30 19 Q. Can you answer the question without debating it?
09:32:33 20 Did the City --

09:32:34 21 A. Sorry.

09:32:35 22 Q. -- put markings in out there?

09:32:37 23 A. Not the first time.

09:32:38 24 Q. Did the City put markings out there?

09:32:42 25 A. Eventually, yes.

09:32:44 1 Q. I understand you want to fence with me and say
09:32:46 2 they --

09:32:47 3 A. I don't want to fence with you.

09:32:48 4 THE COURT: Gentlemen, I'm going to fence
09:32:50 5 with both of you in a few seconds.

09:32:53 6 MR. BAHRET: Forgive me, Your Honor.

09:32:54 7 THE COURT: Without comments and side
09:32:56 8 remarks, let's get a question and an answer. Move
09:32:59 9 along.

09:32:59 10 BY MR. BAHRET:

09:32:59 11 Q. They marked out there; they just didn't do it
09:33:02 12 fast enough to suit you?

09:33:03 13 A. Yes.

09:33:03 14 Q. And those markings were consistent with the
09:33:06 15 Peterman markings that were put out there after all this
09:33:10 16 work was done?

09:33:12 17 A. Yes.

09:33:18 18 Q. Sir, would you agree on this dirt issue, I know
09:33:23 19 yesterday you said maybe only 60 loads of dirt were
09:33:27 20 brought in, but at deposition you did say that you had a
09:33:32 21 dozen dump trucks, and they ran about ten loads or so
09:33:35 22 each.

09:33:35 23 A. Yes.

09:33:36 24 Q. So that's another correction?

09:33:38 25 A. Yes.

09:33:38 1 Q. But there's a lot of dirt. How many tons of
09:33:42 2 dirt would that be?

09:33:43 3 A. We go by yards.

09:33:46 4 Q. Do you know how many --

09:33:48 5 A. But a large dump truck, like what we just said,
09:33:52 6 was ten cubic yards. And as a matter of fact, we
09:33:57 7 have -- since then we have the records; we know -- we've
09:34:01 8 got the records of how many trucks came in. And they
09:34:04 9 were approximately ten cubic yards, which is a big
09:34:08 10 tandem dump truck.

09:34:09 11 Q. Ten cubic yards each?

09:34:11 12 A. Per load.

09:34:12 13 Q. Are you able to tell us approximately how much
09:34:15 14 ten cubic yards of fill dirt weighs?

09:34:18 15 A. That weighs about 50,000 pounds.

09:34:25 16 Q. So each load --

09:34:27 17 A. 25 tons.

09:34:29 18 Q. So each load is 25 tons roughly?

09:34:32 19 A. Roughly.

09:34:33 20 Q. And I realize there could be a variance between a
09:34:36 21 load, but that would be a good average?

09:34:38 22 A. Right.

09:34:39 23 Q. And we've got at least 60 of those?

09:34:42 24 A. Yes.

09:34:49 25 Q. And then after this tonnage of dirt was brought

09:34:53 1 in, you used a bulldozer or had somebody use a bulldozer
09:34:59 2 to push it from the top of the railroad right of way
09:35:03 3 down?

09:35:04 4 A. Right while they were bringing it in there was a
09:35:07 5 dozer pushing it out.

09:35:08 6 Q. They were dumping it up on the level area, of
09:35:11 7 course, that the -- the railroad right-of-way?

09:35:13 8 A. They were dumping it over the edge onto our
09:35:16 9 property and dozing it forward.

09:35:18 10 Q. And obviously the dozer marks, you can see the
09:35:24 11 scrapings on Exhibit A12 include scraping on the top of
09:35:28 12 the railroad right-of-way, correct?

09:35:33 13 A. Yeah. They were operating on top of the
09:35:35 14 railroad.

09:35:35 15 Q. And pushing the dirt from the right-of-way over
09:35:38 16 towards Old Granite?

09:35:39 17 A. Yes. Whatever spilled out up on the top we
09:35:42 18 pushed it back over.

09:35:44 19 Q. I keep saying Old Granite. If I mistakenly use
09:35:47 20 Old Granite --

09:35:48 21 A. I understand.

09:35:49 22 Q. And does putting that tons and tons of dirt onto
09:35:59 23 Old Granite property in the rear affect the drainage
09:36:01 24 plan for Cambridge?

09:36:05 25 A. Well, that -- we were going to reroute the

09:36:08 1 drainage. Certainly now water has to go around that
09:36:12 2 dirt.

09:36:12 3 Q. Is the answer yes, it affects the drainage plan?

09:36:15 4 A. Yes, it does.

09:36:16 5 Q. Did you consult with the man that designed the
09:36:19 6 drainage plan for Cambridge to see if it would be a good
09:36:22 7 idea to put 60-times-25 tons of dirt in the back of the
09:36:30 8 development?

09:36:31 9 A. Yes, I think -- I'm certain that Todd Jenkins and
09:36:37 10 I had mentioned it. That wasn't the main reason I was
09:36:41 11 talking to him, but he knew that.

09:36:44 12 Q. Sir, you testified at deposition he did not know,
09:36:48 13 and Nick Nigh testified right here in court that he did
09:36:52 14 not know.

09:36:52 15 A. They may have forgot. I do not know. But as
09:36:55 16 far as I can remember, I talked to -- I talked to them
09:37:00 17 about it.

09:37:01 18 Q. You would agree that you never did any sort of
09:37:03 19 testing to determine which direction the water flowed in
09:37:06 20 that crossover drain?

09:37:10 21 A. No, we never did. We never could.

09:37:14 22 Q. You didn't do it before it was cut, did you?

09:37:17 23 A. No, we didn't.

09:37:18 24 Q. When it was under discussion, and you were saying
09:37:20 25 the water moved one way; and others were saying no, it

09:37:24 1 didn't, it moved the other way; you didn't do anything
09:37:28 2 to determine who was right, did you?

09:37:30 3 A. Yes. I went to the county engineer's assistant
09:37:35 4 and I said, Which way does it flow? He said, I told the
09:37:38 5 county engineer it flows that way, which way could it
09:37:41 6 go.

09:37:41 7 Q. When did this conversation take place?

09:37:44 8 A. This conversation took place after 2006.

09:37:49 9 Q. Yeah, it took place late in 2007, correct?

09:37:55 10 A. Could have been, yes.

09:37:56 11 Q. So it's not a trick question.

09:37:59 12 A. I understand.

09:38:00 13 Q. I'm asking you if you --

09:38:02 14 A. At that time I did not. No one else apparently
09:38:08 15 was aware this thing obviously went the other way.

09:38:11 16 Q. What I'm getting at, sir, when this thing was, in
09:38:15 17 your mind, of some importance, and we've heard
09:38:17 18 criticisms the City did no testing, you didn't do any
09:38:21 19 testing either, did you?

09:38:22 20 A. We did not do any testing.

09:38:24 21 Q. Including putting dye in it or anything like
09:38:28 22 that?

09:38:30 23 A. No. All we -- I tried to explain the drainage
09:38:36 24 situation.

09:38:37 25 THE COURT: You've answered no, no testing,

09:38:39 1 no dye.

09:38:41 2 THE WITNESS: No.

09:38:44 3 Q. You're aware that the -- and by the way, I've
09:38:48 4 heard counsel call this flooding behind Cambridge.
09:38:52 5 Flooding is not the proper term, is it?

09:38:55 6 A. For what we have behind there now, we would not
09:38:57 7 call that flooding. That's what we call ponding.

09:39:01 8 Q. And you're aware that the ponding issue would be
09:39:06 9 basically just behind lots 15 and 16 at the low spot
09:39:10 10 near that catch basin?

09:39:12 11 A. That's where we've had ponding so far.

09:39:14 12 Q. And, in fact, demonstrated in a photo. That's
09:39:17 13 the ponding area, just right there? There's no ponding
09:39:21 14 up on lots 9, 10, 11, 12, 13, correct?

09:39:25 15 A. No. Maybe 14 we have some small ponding there
09:39:30 16 by the ditch. The ditch gets bigger, but it's not
09:39:34 17 ponding.

09:39:34 18 Q. And you are, in fact, aware of the fact that
09:39:38 19 Cambridge or what is now Cambridge has had ponding
09:39:43 20 issues in those areas near the railroad for many, many,
09:39:47 21 many years?

09:39:52 22 A. I'm aware of -- I didn't see it specifically
09:39:58 23 before.

09:39:58 24 Q. But just knowing the general lay of the land, and
09:40:01 25 from what you've heard from neighbors, you know they

09:40:04 1 have had an issue with ponding, correct?

09:40:08 2 A. The only real --

09:40:11 3 Q. You answer yes or no.

09:40:14 4 A. I have some knowledge of ponding before,
09:40:18 5 secondhand knowledge.

09:40:19 6 Q. Okay. And you'd predict ponding just looking at
09:40:24 7 the lay of the land after a heavy rain; would you not?

09:40:28 8 A. Not if that culvert was working.

09:40:31 9 Q. You wouldn't?

09:40:32 10 A. No. After we first looked at it, there's a
09:40:35 11 culvert there. It should be taking the water away.

09:40:38 12 Q. Would you agree with me that any drainage system
09:40:40 13 is designed to carry a certain amount of water?

09:40:44 14 A. Yes.

09:40:45 15 Q. And would you agree with me that that certain
09:40:51 16 amount of water could be exceeded, which would mean
09:40:55 17 there would be ponding?

09:40:59 18 A. Yes.

09:41:01 19 Q. Do you know what the design capacity for
09:41:04 20 Cambridge is?

09:41:08 21 A. Todd told me that was just for Cambridge, 16
09:41:12 22 acres of drainage. That's what his system, the
09:41:17 23 Cambridge system, was for, 16 acres.

09:41:20 24 Q. Do you know -- and I take it that's the size of
09:41:22 25 Cambridge, by the way?

09:41:23 1 A. Yes, that's the total area.

09:41:25 2 Q. Do you know that Cambridge was designed for a
09:41:28 3 five-year flood standard?

09:41:35 4 A. I'm generally aware of that. I think that was
09:41:37 5 the design standard at that time.

09:41:39 6 Q. And do you know that we have had rain that
09:41:41 7 exceeds the five-year flood standard in 2006 and 2007?

09:41:49 8 A. That, I'm not aware of.

09:42:01 9 Q. If I understand your testimony correctly, you are
09:42:04 10 saying that there was ponding behind the subdivision
09:42:07 11 even before this pipe was cut, and now you claim it to
09:42:11 12 be worse?

09:42:16 13 A. There was ponding behind that.

09:42:18 14 Q. And you claim it's worse?

09:42:21 15 A. It appears to be worse.

09:42:23 16 Q. And you did -- you never saw the back of the
09:42:27 17 property before the middle of 2006 after a heavy rain,
09:42:34 18 did you?

09:42:35 19 A. I saw the property before they cut the pipe.
09:42:38 20 And I was out there since February, and it does appear
09:42:43 21 that there's more water backed up without that pipe.

09:42:46 22 Q. Okay. Did you hear my question, though? Did
09:42:51 23 you ever see the property after a heavy rain before it
09:42:56 24 was cut?

09:42:58 25 A. Yes.

09:43:00 1 Q. And there was obviously standing water?

09:43:05 2 A. There was some temporary standing water, yes, but
09:43:09 3 it --

09:43:10 4 Q. And even now the standing water is temporary as
09:43:13 5 it pertains to lot 15 and lot 16, correct?

09:43:19 6 A. Well, temporary? It's been there for longer
09:43:25 7 than it ever -- that I ever saw it. I wouldn't say
09:43:28 8 it's really temporary now.

09:43:30 9 Q. Sir, the jury walked through the area where your
09:43:33 10 son lives in lot 15. They walked right through the
09:43:36 11 area depicted in this picture.

09:43:38 12 A. Right.

09:43:41 13 Q. Are you aware of that?

09:43:42 14 A. Yes, I am.

09:43:43 15 Q. We walked within three feet of those utility
09:43:47 16 boxes that are shown there on Exhibit 37.

09:43:50 17 A. Right.

09:43:50 18 Q. Nobody got muddy.

09:43:52 19 A. Right.

09:43:53 20 Q. And that's because the water comes and goes; it's
09:43:59 21 temporary?

09:44:00 22 A. But the water on 16 has been there. It was there
09:44:03 23 when they went out too.

09:44:04 24 Q. The majority of the water that's over there is
09:44:07 25 actually not even on Cambridge property, correct?

09:44:12 1 A. I would say that's correct, yes.

09:44:19 2 Q. Let's talk about the back of lots 15, 16, and 17
09:44:27 3 before you brought in the tonnage of dirt. There was a
09:44:33 4 wall there; was there not?

09:44:35 5 A. Yes, there was.

09:44:37 6 Q. There was a retaining wall made up of railroad
09:44:41 7 ties that are stacked up, correct?

09:44:44 8 A. Yes, there was.

09:44:45 9 Q. And that wall was at least five if not six feet
09:44:51 10 tall, correct?

09:44:52 11 A. Yes. The exposed part was four, five, six feet.

09:44:59 12 Q. And that wall is not visible now, correct?

09:45:04 13 A. That's right.

09:45:06 14 Q. And nobody cleared trees or foliage on the
09:45:13 15 Cambridge side of the wall, did they?

09:45:18 16 A. We didn't clear anything, no.

09:45:19 17 Q. Well, neither did Vermillion, did they?

09:45:24 18 A. Well, the trees were hanging out over it 15 feet.
09:45:28 19 They took all that out.

09:45:30 20 Q. They took what out?

09:45:31 21 A. All the trees that were overhanging that wall,
09:45:34 22 the stumps were right on the wall, right against the
09:45:36 23 wall, and they overhang. They took all that out.

09:45:39 24 Q. So the stumps that are up on the right-of-way?

09:45:41 25 A. Up on the wall.

09:45:42 1 Q. They took the stumps, the trees out that were up
09:45:45 2 top on the railroad right-of-way?

09:45:46 3 A. That's right. There was nothing down below.
09:45:49 4 There was little, little or nothing down below at that
09:45:53 5 property.

09:45:53 6 Q. And those tree, what you're saying is they have,
09:45:56 7 like --

09:45:56 8 A. A canopy that came out.

09:45:58 9 Q. And so they're providing shade to the backyard or
09:46:01 10 whatever. But those stumps or the trunk was up on the
09:46:08 11 railroad property?

09:46:10 12 A. Trunk and the vines coming out of the ground,
09:46:13 13 whatever you want to call them, the shoots.

09:46:17 14 Q. So the tonnage that you brought in of dirt is
09:46:21 15 sufficient to cover everything that would be on
09:46:24 16 Cambridge property at the bottom of that wall?

09:46:29 17 A. That's right. We put it right up against that
09:46:32 18 wall.

09:46:32 19 Q. If there was any vegetation of any kind, whether
09:46:35 20 it's brambles, bushes, anything, it's obliterated now?

09:46:44 21 A. It's not obliterated. We just covered it up.

09:46:48 22 Q. Okay. What's that do to the health of a bush to
09:46:52 23 cover it up with five feet of dirt?

09:46:54 24 A. A stump? These were all cut, as we saw
09:46:57 25 yesterday.

09:46:57 1 Q. No, sir, you just told me that nothing was cut on
09:47:00 2 Cambridge property behind that wall.

09:47:01 3 A. Well, I mean on top.

09:47:03 4 Q. Okay. You covered below?

09:47:07 5 A. And we brought it up to the top. It was above.
09:47:14 6 As you can see in the photo, its coved a little bit,
09:47:17 7 just barely covered the vegetation. The stumps and
09:47:21 8 that, its covered that whole thing. You couldn't see
09:47:23 9 it. That's why we had to dig it out again.

09:47:26 10 Q. And it covered whatever was growing on the
09:47:29 11 Cambridge side of that retaining wall?

09:47:35 12 A. It covered the ground there, and it spilled up
09:47:40 13 out on top of the --

09:47:42 14 Q. It covered whatever was growing? Did you hear
09:47:44 15 the question? "Growing" is the operative word.

09:47:47 16 A. Wasn't growing. It was dead. It was cut.

09:47:50 17 Q. We're not communicating. One more time.

09:47:56 18 Nothing was cut on the Cambridge side of the
09:47:59 19 retaining wall?

09:48:01 20 A. There was nothing there, basically nothing there.

09:48:07 21 Q. They had no vegetation?

09:48:09 22 A. No. There was the wall. There was no
09:48:11 23 vegetation down at the bottom of that wall at that
09:48:14 24 property.

09:48:14 25 Q. Why not?

09:48:15 1 A. Because that was the yard. That was already
09:48:19 2 five feet into the yard, leaning five feet into the
09:48:24 3 yard. The grass went right up to that wall at that
09:48:27 4 point. There were one or two big trees in there and
09:48:30 5 still are. But that's -- it was basically grass.

09:48:33 6 Q. Sir, speaking of big trees, what's it do to a
09:48:37 7 tree to cover the roots by a couple feet of dirt? Do
09:48:43 8 you know?

09:48:44 9 A. Yes.

09:48:44 10 Q. It kills them, doesn't it?

09:48:46 11 A. Some trees it will kill.

09:48:48 12 Q. Most trees it will kill, correct?

09:48:52 13 A. No.

09:48:53 14 Q. Did you consider the fact that covering these
09:48:56 15 trees with a large amount of dirt would kill them?

09:49:00 16 A. These were already cut, all of them were cut.
09:49:05 17 They were gone. It's just the ones we just saw. We
09:49:09 18 spilled dirt on top of them.

09:49:11 19 Q. Sir, the jury was out there, and we all saw trees
09:49:18 20 that are still there.

09:49:20 21 A. Right. But this is the exceptions, I mean,
09:49:24 22 these couple trees. But it was grass right up to that
09:49:27 23 wall.

09:49:27 24 Q. And we all saw trees that are knee-deep in dirt.
09:49:33 25 And that's dirt that you put there?

09:49:34 1 A. Right. The two trees that were still there had
09:49:37 2 dirt around them.

09:49:38 3 Q. And did you consider the fact that doing that
09:49:40 4 would likely kill those trees?

09:49:42 5 A. Yes, we did.

09:49:43 6 Q. And you did it anyway?

09:49:46 7 A. Yes, we did it anyways because we were figuring
09:49:50 8 we were going to put the mound up. If they died, we'd
09:49:54 9 take them down then. There's no point in losing that
09:49:57 10 as well. Yes, we did really consider that.

09:50:06 11 Q. To your knowledge has Cambridge done anything at
09:50:09 12 all to plant any vegetation of any kind on its border
09:50:14 13 since the water main project was done?

09:50:17 14 A. No, we haven't done anything.

09:50:19 15 Q. No trees, no brambles, not even a flower?
09:50:28 16 Haven't done squat, correct?

09:50:33 17 MR. ROBON: Objection to the phrase --

09:50:35 18 THE COURT: I'll sustain that objection.

09:50:37 19 Has anything been planted, whatever it may be, yes or
09:50:40 20 no?

09:50:42 21 THE WITNESS: No.

09:50:42 22 THE COURT: Thank you.

09:50:46 23 BY MR. BAHRET:

09:50:46 24 Q. I believe -- I don't know if it was you, but
09:50:49 25 there's been mention of brambles as something that grows

09:50:51 1 pretty fast. Is that right?

09:50:53 2 A. I'm told.

09:50:57 3 Q. And brambles and other forms of vegetation could
09:51:00 4 certainly be planted back behind Cambridge now; could
09:51:04 5 they not?

09:51:10 6 A. Not really.

09:51:13 7 Q. Can't get a spade in the ground, or what's the
09:51:17 8 problem? Why can't we plant brambles now?

09:51:20 9 A. Need a mound first.

09:51:21 10 Q. No, you don't need a mound. You can plant a
09:51:24 11 bramble.

09:51:24 12 A. Not that kind of ground. Even our -- the more
09:51:31 13 we look at it, you have to at least put some fill in
09:51:33 14 there to get it up out of that ditch area where it's
09:51:36 15 swampy or whatever you put in there would die. But we
09:51:40 16 didn't consider that. We were going to build the mound,
09:51:43 17 put trees on it. We stopped everything with this -- we
09:51:47 18 thought we were going to settle this thing back in 2006.

09:51:50 19 Q. Sir, let's not go there.

09:51:52 20 A. Okay.

09:51:55 21 Q. You would agree -- maybe you wouldn't; I don't
09:51:59 22 know -- nothing was removed from at least this half of
09:52:05 23 the development, lots 9, 10, 11, 12. Nothing was
09:52:11 24 removed from Cambridge property, correct?

09:52:15 25 A. That, I can't say. I wasn't there.

09:52:18 1 Q. And the dirt wasn't disturbed, and you didn't put
09:52:22 2 any dirt on that half of the development, did you?

09:52:24 3 A. We didn't go up there, no.

09:52:27 4 Q. And so the back of Cambridge on that half of the
09:52:31 5 development is still exactly the same now as it was
09:52:34 6 before the water project?

09:52:39 7 A. I can't say that.

09:52:42 8 Q. You can't say I'm wrong either?

09:52:47 9 A. I can't say you're wrong either. I didn't see
09:52:50 10 this, how far they came across on Cambridge property up
09:52:57 11 there. I could not see that.

09:53:00 12 Q. Sir, back to the dirt issue. Did you personally
09:53:04 13 drive the bulldozer, or was that somebody else?

09:53:06 14 A. Both of us.

09:53:07 15 Q. Did anybody cover --

09:53:09 16 A. A little backhoe.

09:53:10 17 Q. No, I'm talking about a bulldozer.

09:53:13 18 A. I didn't drive a bulldozer.

09:53:16 19 Q. Did the bulldozer driver cover parts of the
09:53:20 20 railroad fence?

09:53:23 21 A. Did he cover the fence?

09:53:25 22 Q. Yes.

09:53:27 23 A. What fence are we talking about?

09:53:28 24 Q. The railroad fence.

09:53:29 25 A. The railroad tie fence?

09:53:32 1 Q. Yes.

09:53:33 2 A. We put dirt on top of that too.

09:53:36 3 Q. Okay. And, in fact, the debris from the railroad
09:53:40 4 fence that was bulldozed over, one of those pictures
09:53:44 5 shows something knocked over laying sideways in one of
09:53:49 6 the trenches you dug up, correct?

09:53:51 7 A. The timber.

09:53:52 8 Q. Yeah.

09:53:53 9 A. Yeah, there's a timber that's there. I don't
09:53:56 10 know whether that was originally done or whether we did
09:53:59 11 it. But one of the timbers --

09:54:01 12 Q. And that timber wasn't in the same position that
09:54:04 13 it had been in before it was pushed by a bulldozer, was
09:54:08 14 it?

09:54:08 15 A. That's very possible. Some of the top timbers
09:54:14 16 were all deteriorated. When we were putting the dirt
09:54:17 17 on top of it, some of those may be disturbed.

09:54:21 18 Q. The dirt was pushed about 20 to 25 feet, correct?

09:54:25 19 A. Yes. It was dumped on property; it was pushed
09:54:31 20 along the line, 25 feet -- 20, 50 feet down the line.

09:54:38 21 It had to be -- it had to be dozed down where you
09:54:43 22 saw it now, it's more than 25 feet.

09:54:50 23 THE COURT: How much longer do we have?

09:54:53 24 MR. BAHRET: 15.

09:54:54 25 THE COURT: Jury are we okay for another ten

09:54:56 1 minutes, 15 minutes?

09:54:59 2 (The jurors nod.)

09:55:01 3 Q. By the way, you may have said this. If so, I
09:55:03 4 apologize. All of the stuff you're doing with the
09:55:06 5 bulldozer and the dirt is before the pipe arrived and
09:55:09 6 before it was installed, correct?

09:55:11 7 A. Yes.

09:55:12 8 Q. Then the work where you're excavating, that was
09:55:15 9 done while the pipe was in position and the contractor,
09:55:17 10 Ric-man, is about to begin laying the pipe?

09:55:21 11 A. Yes.

09:55:22 12 Q. Did you ask Ric-man for permission to dig
09:55:25 13 trenches next to the construction project?

09:55:30 14 A. I talked to them about it. And --

09:55:33 15 Q. Did you ask permission to dig trenches next to
09:55:37 16 their project?

09:55:38 17 A. We were on our property. That trench is on our
09:55:42 18 property.

09:55:43 19 Q. I'll take that to be a no?

09:55:45 20 A. We did not ask him, no. We did not ask him.

09:55:48 21 Q. Did you consider the fact that you may be putting
09:55:50 22 Ric-man's employees in danger by digging trenches within
09:55:54 23 inches of a construction project?

09:55:57 24 A. We took that into consideration. We understood
09:56:01 25 what it was. He didn't like us there.

09:56:05 1 Q. And in fact --

09:56:06 2 A. It was our men we were worried about.

09:56:09 3 Q. There was a fence put up, one of those yellow --
09:56:14 4 or orange, excuse me, barrier-type fences?

09:56:16 5 A. Right.

09:56:18 6 Q. I forget the terminology. Whatever that's
09:56:21 7 called.

09:56:22 8 And you removed it, correct?

09:56:24 9 A. We temporarily moved that so we could stand up
09:56:28 10 there and survey and that kind of thing. We put it back
09:56:32 11 up, that plastic fence, construction fence.

09:56:38 12 Q. I believe Ric-man's going to say you never put it
09:56:41 13 back up, but you say you did?

09:56:42 14 A. Yes, we put it back up several times.

09:56:45 15 Q. You put it up several times?

09:56:48 16 A. Well, we weren't out there just one day. We'd
09:56:50 17 take it down, put it back up. And, you know --

09:57:06 18 Q. Sir, you've seen pictures of the monument that's
09:57:14 19 here in 16, the corner monument or whatever you call it,
09:57:18 20 the survey monument?

09:57:19 21 A. Corner monument.

09:57:20 22 Q. And you've seen the remains of the railroad fence
09:57:23 23 right there near that monument?

09:57:25 24 A. Yes, I have.

09:57:26 25 Q. And all the vegetation is still there, correct?

09:57:31 1 A. That's still there.

09:57:32 2 Q. And that railroad fence, if it were standing up,
09:57:35 3 it would be basically touching that monument? I know
09:57:40 4 it's leaning over.

09:57:41 5 A. Yeah. If you stood it back up from way down
09:57:44 6 where it is, it would be pretty close to that monument
09:57:48 7 line.

09:57:49 8 Q. And that area, that area near the -- I don't know
09:57:55 9 if that's north or east.

09:57:57 10 A. That's east.

09:57:58 11 Q. But towards Bates Road. That area right there
09:58:01 12 where that photograph is. And you know the photograph
09:58:03 13 I'm talking about, right?

09:58:05 14 A. Yes.

09:58:05 15 Q. That wasn't encroached upon, correct? You still
09:58:09 16 see the vegetation there?

09:58:13 17 A. Well, no, I think it was encroached upon. There
09:58:16 18 was other vegetation out there when we went out there.
09:58:20 19 They pulled that out of there too. But a lot of it was
09:58:23 20 left.

09:58:23 21 Q. So something was bulldozed out of there after the
09:58:25 22 picture was taken?

09:58:26 23 A. No. Even at the time of the picture, if you
09:58:30 24 looked up and saw, they went there and cleared it with
09:58:35 25 large equipment. It was all entangled when they pulled

09:58:39 1 that out. Some of that upper vegetation was removed.
09:58:42 2 But, you know, they had other trees. They had other
09:58:48 3 trees to keep their property isolated. We didn't have
09:58:54 4 that.

09:58:59 5 Q. Have you ever seen these pictures of Mr. Laskey
09:59:05 6 standing in his -- in this development? Have you seen
09:59:12 7 this picture before?

09:59:13 8 A. Yes, I believe that I took this picture.

09:59:15 9 Q. And that's a survey stake?

09:59:19 10 THE COURT: Does that have an exhibit
09:59:21 11 number?

09:59:22 12 MR. BAHRET: A1. I'm sorry.

09:59:23 13 Q. Does A1 show what apparently, based on the sign
09:59:30 14 Mr. Laskey is holding, he's posing next to a survey
09:59:34 15 stake saying lot 12?

09:59:36 16 A. Yes.

09:59:36 17 Q. What's all that green stuff surrounding him?

09:59:41 18 A. This is what had grown-up in -- I believe this
09:59:46 19 was towards the end. Do we have date on this? I think
09:59:49 20 this was towards the end of 2006. Some of this has
09:59:53 21 started to grow up a little bit.

10:00:00 22 Q. You see a fence up there, the barrier fence or
10:00:04 23 whatever I'll call that?

10:00:08 24 THE COURT: Point to it.

10:00:09 25 A. That's the silt curtain, silt fence, they call

10:00:14 1 it.

10:00:14 2 Q. That's up on the railroad right-of-way, correct?

10:00:16 3 A. That was pretty close to the property line.

10:00:21 4 Q. Nobody did any cutting down here, sir; the
10:00:33 5 cutting was all up here, correct?

10:00:37 6 A. No. When they pulled this material from up
10:00:41 7 here, we had, you know -- and I wasn't there. I didn't
10:00:45 8 see what was there ahead of time. But from what I saw
10:00:48 9 on either side, this was so entangled that its pulled --
10:00:56 10 it pulled material all the way over to the property
10:00:58 11 line.

10:00:58 12 Q. Do you see this thing here?

10:01:00 13 A. Yes.

10:01:00 14 Q. That's a ditch, correct?

10:01:02 15 A. Yeah, there's a ditch in there.

10:01:05 16 Q. And you're claiming that people came 20 feet
10:01:11 17 onto -- over the ditch to get to the back where Mr.
10:01:18 18 Laskey is standing and clear cut that?

10:01:21 19 A. I believe this is more like ten feet.

10:01:26 20 Q. And are you aware of the fact that even Nick Nigh
10:01:31 21 doesn't claim, the guy that did the survey for
10:01:35 22 Cambridge, doesn't claim there was an encroachment down
10:01:38 23 there?

10:01:39 24 A. I understand. We never asked him to go up there.
10:01:43 25 We could not come up with any solid evidence of the tree

10:01:50 1 trunks or the shoots coming out up in this area.

10:01:54 2 Q. Okay. Have you ever seen this picture, sir?

10:02:04 3 THE COURT: Exhibit Number?

10:02:05 4 MR. BAHRET: A3.

10:02:09 5 BY MR. BAHRET:

10:02:09 6 Q. Apparently, based on the clipboard Mr. Laskey, I
10:02:12 7 assume, is holding, that's in the area of lot 4. Do
10:02:16 8 you see that?

10:02:17 9 A. Yes.

10:02:17 10 Q. What's all this stuff over here that appears to
10:02:21 11 be growing between where Mr. Laskey is standing and
10:02:24 12 where the railroad right-of-way is?

10:02:27 13 A. There is some -- this is new growth, whatever
10:02:34 14 wasn't pulled out.

10:02:35 15 Q. That all grew up in the -- since the project was
10:02:40 16 done?

10:02:40 17 A. It turned green. Some of this was -- some of
10:02:43 18 this low stuff was still there.

10:02:56 19 Q. I believe that says lot 9. A5 is the exhibit.
10:03:01 20 Have you seen that before?

10:03:02 21 A. Yes.

10:03:04 22 Q. And Mr. Laskey is there depicted in the middle of
10:03:09 23 what?

10:03:12 24 A. Mr. Laskey is standing there by what appears to
10:03:17 25 be the property line stake.

10:03:19 1 Q. And what's all that that's clearly not on the
10:03:22 2 property then, it's even out towards the railroad;
10:03:27 3 what's all that stuff?

10:03:27 4 A. Up here at line 9, they did not -- there were
10:03:35 5 some big trees. They couldn't pull them in. They
10:03:37 6 didn't take down the small stuff. They didn't clear
10:03:40 7 back up at the last 50 feet of this property. That's
10:03:44 8 very standard.

10:04:08 9 MR. BAHRET: Let me check my notes. I may
10:04:10 10 be done.

10:04:31 11 BY MR. BAHRET:

10:04:31 12 Q. Sir, you did personally put lath -- and for the
10:04:34 13 jury, lath is those thin --

10:04:37 14 A. Tall boards.

10:04:42 15 Q. As a kid I always called those stakes, but I'm
10:04:45 16 told that's the wrong terminology. But the things that
10:04:48 17 you commonly see --

10:04:49 18 A. The peg is a stake, generally the surveyors call
10:04:52 19 it. The lath is what tells you where the peg is.

10:04:55 20 Q. I've since learned that terminology. But you
10:04:57 21 put some of that stuff in; did you not?

10:04:59 22 A. Yes, as we talked about yesterday.

10:05:01 23 Q. And you are not a surveyor, correct?

10:05:04 24 A. I'm not a registered surveyor

10:05:11 25 MR. BAHRET: Thank you. I don't think I

10:05:13 1 have any further questions at this time.

10:05:14 2 THE COURT: We're about at break time, but
10:05:17 3 do you have redirect?

10:05:18 4 MR. ROBON: Just a couple questions.

10:05:20 5 THE COURT: Okay. Jury, can we get those
10:05:22 6 in? Thank you. You may proceed.

10:05:26 7 How many is a couple?

10:05:27 8 MR. ROBON: Two. Judge Franklin once, when
10:05:31 9 I was a really young lawyer, I said I had one question.
10:05:34 10 The problem was it led to more. And he said -- I think
10:05:36 11 he counted ten.

10:05:41 12 - - -

10:05:41 13 JOHN MCCARTHY, REDIRECT EXAMINATION

10:05:43 14 BY MR. ROBON:

10:05:43 15 Q. Can I have that photograph, A 5.

10:05:49 16 THE COURT: The corollary to that story is I
10:05:52 17 was a lawyer in a case, and my mentor partner told the
10:05:55 18 judge, I have one more question. The judge said, okay.
10:05:59 19 He asked one question, and he sat down. The judge was
10:06:02 20 so dumbfounded he said, In my 30 years on the bench,
10:06:05 21 that's the only time a lawyer has said I have one
10:06:08 22 question and asked just one question.

10:06:13 23 BY MR. ROBON:

10:06:13 24 Q. In looking at Exhibit A3 where Mr. Laskey is on
10:06:18 25 lot 14 --

10:06:20 1 A. Yes.

10:06:20 2 Q. -- hasn't this whole area here all been cut and
10:06:23 3 the brush just laying there?

10:06:25 4 MR. BAHRET: Objection to leading.

10:06:27 5 MR. ROBON: I'll rephrase question.

10:06:28 6 THE COURT: Overruled.

10:06:31 7 MR. ROBON: Go ahead.

10:06:32 8 THE COURT: If you know.

10:06:33 9 A. That's what it appeared to be. I didn't see it.

10:06:37 10 Q. Wasn't this area 15 to 20 feet high --

10:06:41 11 MR. BAHRET: Objection.

10:06:43 12 Q. -- originally?

10:06:44 13 THE COURT: Overruled. If you know.

10:06:46 14 A. I didn't see it. It appears that it was because
10:06:52 15 of what evidence we have here. Yes, it appears that
10:06:56 16 way.

10:06:56 17 Q. My last question is, isn't it true or just tell
10:07:02 18 the jury, where can the water go now from the manhole
10:07:07 19 that doesn't have an exit?

10:07:10 20 A. Back up on Cambridge property. We're in the low
10:07:14 21 area. They were out there. They saw that's the low
10:07:17 22 area, backs up there.

10:07:20 23 MR. ROBON: No further questions.

10:07:22 24 THE COURT: Thank you. You may step down,
10:07:24 25 Mr. McCarthy.

10:07:25 1 THE WITNESS: Thank you.

10:07:26 2 THE COURT: Ladies and gentlemen, we will
10:07:27 3 take our morning recess. You put in a good day's work
10:07:30 4 already. We'll take a 15 minute break at this point.
10:07:32 5 So we'll be back by the courtroom clock at 10:20.
10:07:37 6 We're in recess. Remember the rules.

10:12:33 7 (Recess taken.)

10:26:40 8 (The witness was sworn by the clerk.)

10:26:41 9 THE COURT: Ladies and gentlemen, the next
10:26:42 10 witness has been sworn.

10:26:44 11 Mr. Robon, the floor is yours.

10:26:45 12 - - -

10:26:48 13 ROGER HERRETT, DIRECT EXAMINATION

10:26:49 14 BY MR. ROBON:

10:26:49 15 Q. Would you introduce yourself to jury, tell them
10:26:52 16 what your name is, where you live, and what you do for a
10:26:55 17 living?

10:26:55 18 A. My name is Roger Herrett. I live in Defiance,
10:26:59 19 Ohio. I'm the retired state extension forester in
10:27:04 20 northwest Ohio. Back in 1960 I started out in southern
10:27:10 21 Ohio out of Chillicothe, and they transferred me up to
10:27:16 22 Defiance in October of 1960 for a temporary appointment
10:27:20 23 there, and I ended up 34 years later retiring from up
10:27:24 24 there. So if you call that temporary, that's where I
10:27:28 25 was. I worked 7 to 10 counties in northwest Ohio

10:27:32 1 working with private land owners in Woodland management,
10:27:36 2 timber harvesting assistance, insect and disease
10:27:43 3 problems, educational, school -- not problems, but
10:27:47 4 situations and activities, tours, et cetera, et cetera.
10:27:50 5 I did lots and lots of tree planting, northwest Ohio,
10:27:56 6 especially as you get closer to the Indiana line it's
10:27:59 7 quite open, and I recognized early on the need for
10:28:03 8 windbreak, and so I initiated my own and got a lot of
10:28:08 9 help later on from soil and water and everybody else the
10:28:12 10 need for windbreak plantings for protection of the soil,
10:28:16 11 wildlife habitat, et cetera.

10:28:19 12 I received an award, which was a real surprise to
10:28:23 13 me. One year I got a notice or phone call from Columbus
10:28:28 14 that they wanted me to come down to Columbus to the
10:28:30 15 Governor's office. And, boy, I thought I was in
10:28:34 16 trouble. But as it turned out I received a very nice
10:28:37 17 award as the state employee that had planted or assisted
10:28:42 18 in planting the most trees that had ever been planted in
10:28:45 19 the State of Ohio with somewhere between three and four
10:28:49 20 million trees that I had sold up here in corn, beans,
10:28:53 21 and wheat territory. So I was pretty proud of that.
10:28:56 22 Anyway, I'm retired from that job. I continue to do
10:28:59 23 consulting work. I'm married.

10:29:02 24 Q. Is this your wife?

10:29:03 25 A. My wife is in the back. The lovely gray-haired

10:29:07 1 lady back there. We've been married 54-plus years now.
10:29:11 2 We have four children and nine grandchildren. And
10:29:14 3 without boring you any further, that's who I am and what
10:29:18 4 I do, and thank you.

10:29:19 5 Q. And when you were in forestry, do you develop
10:29:26 6 specialties about what kind of trees are valuable, how
10:29:31 7 trees are valuable in certain locations?

10:29:33 8 A. Very much so. We -- you learn early on that
10:29:41 9 certain trees are very much adaptable to certain soils.
10:29:45 10 So you work closely with it trying to select the proper
10:29:49 11 specie to plan on the land that you're either trying to
10:29:53 12 replant or whatever. It's been a very interesting
10:29:57 13 situation to know that I have never been able to figure
10:30:01 14 out how God took these little acorns and planted them in
10:30:08 15 the ground. And all of a sudden the statement came up:
10:30:13 16 Mighty oaks from little acorns do grow. I've tried
10:30:16 17 planting those little acorns on many occasions and had
10:30:20 18 failures. But somehow or another nature is able to do
10:30:23 19 what we have trouble doing unless we go through a very
10:30:29 20 careful situation and planting what we're doing on
10:30:34 21 certain soils.

10:30:35 22 Q. Can you tell the jury what your assignment was,
10:30:41 23 what I asked you to do and what you did?

10:30:45 24 A. I was asked by Mr. Robon to come up and look at
10:30:52 25 the Cambridge subdivision. I had been told that some

10:30:58 1 vegetation had been removed from the back of the
10:31:01 2 property. He sent me some photographs and pictures.

10:31:04 3 Q. Did I send you the survey also?

10:31:07 4 A. And sent me a survey also, a copy of which I have
10:31:10 5 here in this folder if I need to reference because I
10:31:15 6 can't remember all this stuff.

10:31:18 7 I'm kind of like Webster, somewhere along the
10:31:22 8 line he said it's not a wise man that knows everything,
10:31:25 9 but he knows where to find the answer to everything.
10:31:27 10 So I carry my notes with me a little bit. But anyway,
10:31:31 11 I came up and I looked at the property and drove in the
10:31:35 12 streets and got out and walked to the back of the
10:31:37 13 property, but I didn't go any further than where the
10:31:41 14 property lines were, and then walked back and forth.
10:31:45 15 And it was pretty obvious to me that why would anybody
10:31:48 16 want to have lots that run right back to an open area.
10:31:54 17 And it so happened that particular day -- in fact, I was
10:31:58 18 there a couple of times; there were always railroad cars
10:32:02 19 sitting over on what's CSX -- I don't know if it's CSX's
10:32:08 20 railroad, but I believe it is.

10:32:09 21 So he asked me, you know, what I felt had been
10:32:15 22 done here, what the damages might be, and so I've worked
10:32:21 23 to try to figure out what the damages are as best as I
10:32:28 24 can. And I incorporated a lot of things into that. If
10:32:33 25 that answers your question.

10:32:34 1 Q. Yes. Now, we talked about trying --

10:32:39 2 THE COURT: I'm sorry, when were you there?

10:32:42 3 THE WITNESS: Most recently I was there
10:32:44 4 about two weeks ago. And the first time I was there
10:32:47 5 was about six weeks ago. I can't tell you exactly the
10:32:49 6 dates.

10:32:50 7 THE COURT: Thank you.

10:32:51 8 THE WITNESS: Yes, sir.

10:32:52 9 BY MR. ROBON:

10:32:55 10 Q. When you and I talked, we talked about trying to
10:32:58 11 create a barrier or a buffer similar to what was there
10:33:04 12 before the vegetation was cut, correct?

10:33:06 13 A. That's correct.

10:33:07 14 Q. Can you tell the jury the different things that
10:33:11 15 you thought about and what you ultimately came up with
10:33:16 16 with regard to replacement cost of putting up what the
10:33:21 17 surveyor shows was cut down. And the surveyor
10:33:26 18 yesterday testified that there were thousands of what
10:33:29 19 they call the brambles that were -- he didn't show them
10:33:34 20 all on the survey, but he testified there were thousands
10:33:36 21 of them within five or six feet that was stripped.

10:33:40 22 A. That's correct. And when I looked at the
10:33:45 23 property, I could see lots and lots of stumps, any one
10:33:49 24 that range from the size of my finger to six or eight
10:33:52 25 inches in diameter that had been taken down. As best

10:33:57 1 as I could, I tried to determine, you know, where the
10:34:00 2 new survey property line was because I -- it had been
10:34:05 3 surveyed back there so that I could tell where it was.
10:34:07 4 But it becomes a real problem to, as I said earlier, to
10:34:13 5 try to replace what just kind of evolved over the last
10:34:18 6 15, 20, 25, 30, 35 years. I have no way of knowing,
10:34:23 7 and nobody has told me how long it had been since
10:34:28 8 anybody had done any tree, brush, briars control along
10:34:34 9 the back of that property, which offered a wonderful
10:34:38 10 windbreak, wildlife habitat, sound barrier, the whole
10:34:44 11 nine yards. And it was gone. It's just bare.

10:34:49 12 Q. I'm going to hand you what we've marked as
10:34:52 13 Exhibit Number 1. I think I showed you this aerial
10:35:01 14 that was taken in 2006. It showed the line of trees
10:35:06 15 behind the Cambridge subdivision.

10:35:08 16 A. That is correct.

10:35:12 17 Q. So go ahead. I didn't mean to interrupt you.

10:35:14 18 A. That's fine.

10:35:15 19 Q. You were talking about it would be hard to
10:35:18 20 replace?

10:35:18 21 A. It would be not impossible to replace it, but it
10:35:23 22 couldn't all be done in one year because it didn't all
10:35:27 23 happen in one year. So what I did was try to determine
10:35:34 24 the things that would be necessary to try to put living
10:35:39 25 vegetation across there as opposed to some other form of

10:35:46 1 wall or structure, which I'm not real fond of.

10:35:50 2 Q. We even talked about walls, didn't we?

10:35:54 3 A. Yes, we did. It's been interesting not to
10:35:59 4 divert myself from trees to walls, but it's been
10:36:02 5 interesting to see where walls have been put up along
10:36:05 6 highways for sound barriers, et cetera, how they used to
10:36:09 7 just be an old ugly piece of concrete or even boards,
10:36:14 8 you can go from here to Detroit along I-75 and there's
10:36:19 9 still some of the old wood structures there. Now you go
10:36:23 10 by and you see where the concrete had been molded in
10:36:26 11 molds with leaves on it and with bears and animal, and
10:36:29 12 anything to make it interesting. They're even doing
10:36:32 13 that on bridge overpasses to make it more attractive.
10:36:36 14 But being a tree person, I guess I find my beauty in
10:36:40 15 what nature provides, and that's natural vegetation.
10:36:46 16 So if you want me to tell you at this point how --

10:36:52 17 Q. I want you to tell the jury based upon a
10:36:54 18 reasonable degree of certainty what you believe -- what
10:37:01 19 you believe should be done and what kind of cost would
10:37:05 20 be incurred in trying to put back the five or six feet
10:37:11 21 of vegetation that was stripped?

10:37:14 22 A. All right. Step number one, of course, you go
10:37:18 23 out and you walk over it and you look the area over, you
10:37:23 24 determine what needs to be done before you even get
10:37:26 25 started. And in this area of five -- four, five, six

10:37:33 1 feet, it varies in distance. You find all kinds of
10:37:36 2 stumps and obstructions there that have to be removed.
10:37:40 3 So you have a cost involved in clearing that ground,
10:37:46 4 soil, so that you can get ready to plant something new
10:37:51 5 there. And that can be rather costly to go across 500
10:37:57 6 or so feet, three, four, five, six feet wide to get it
10:38:03 7 all cleared out, get all the old stumps, get all the
10:38:06 8 root, get everything out of there.

10:38:09 9 Why do you have to get them out of there?
10:38:12 10 Because it's just the most effective way to do farming
10:38:15 11 of trees, putting them the ground, that's to get it all
10:38:19 12 cleaned up.

10:38:20 13 So now once all that's done, go to step Number 2.
10:38:23 14 And that is that you take some samples of the soil all
10:38:27 15 the way across there and determine what your soil type
10:38:32 16 is and what nutrients are there, what needs to be there,
10:38:37 17 put in the nutrients if they're missing. It might be
10:38:42 18 lime; it might be nitrogen; it might be various
10:38:46 19 different things so you then have a good soil bed.

10:38:50 20 And then once this is done, you go to your
10:38:55 21 knowledge books and what you've done in the past, and
10:38:59 22 you determine, well, what might be the best species that
10:39:02 23 I can plant. And these species can vary. Some --
10:39:08 24 there are more than one specie, of course, that could be
10:39:11 25 planted across there, but you've got to think, what is

10:39:15 1 it I'm trying to do? Am I just trying to build a wall,
10:39:19 2 or am I trying to, with the best of human abilities,
10:39:24 3 recreate the wildlife habitat that was there. Because
10:39:30 4 I have seen many areas like this in my lifetime where
10:39:36 5 it's just a bramble in the eyes of some people. In the
10:39:41 6 eyes of other people it's a fantastic wildlife habitat
10:39:45 7 that you've got cardinals coming to your feeder, you've
10:39:48 8 got every conceivable type of bird you can think of.
10:39:51 9 And that's what comes out of that type of habitat. So
10:39:55 10 you try to go in and replant that. But it's pretty
10:40:02 11 obvious to me, and I hope that the jury might understand
10:40:06 12 that you just can't go in there and replant 15, 20, 25
10:40:13 13 foot tall plants of vegetation. You have to start with
10:40:18 14 something of a sensible size, and normally that is
10:40:21 15 somewhere in the six to seven to eight foot category.
10:40:25 16 And you plant multiple species of hardwoods, conifer --
10:40:32 17 conifers being evergreen trees of some sort. It might
10:40:37 18 be red cedar, which have a food value for trees,
10:40:41 19 whatever you know will plant -- will grow on that soil
10:40:45 20 based on your soil sample analysis. And so you plant
10:40:48 21 those trees. And now you have something that's fairly
10:40:55 22 nice, you hope. And then you hope that you have rains,
10:40:57 23 and you hope that the weather conditions are right that
10:41:01 24 the things are going to take hold and they're going to
10:41:04 25 grow for you. And I've had a lot of failures in my

10:41:08 1 lifetime of planting trees because the good Lord just
10:41:13 2 didn't put down rain when it should have put down rain.
10:41:16 3 And ask any farmer how that works. And planting trees
10:41:19 4 is just another form of farming. You have your good
10:41:23 5 crop years, and you have your bad crop years.

10:41:26 6 If you have a bad crop year and you have a lot of
10:41:30 7 failure across there, then you have to do replants, and
10:41:35 8 who knows how many replants nature did across that 500
10:41:40 9 feet or -- well, across the back of there when plants
10:41:45 10 started. They grew to be little things like that; they
10:41:48 11 died off; nobody was there watching them, but then more
10:41:51 12 seeds took hold and they grew again, and finally the
10:41:55 13 barrier of vegetation was there. This is what we're
10:41:59 14 trying to recreate.

10:42:01 15 Now, once you get them planted and everything is
10:42:03 16 growing, it's not the size that you want it to be. So
10:42:08 17 now we have to wait. And we have to wait maybe seven,
10:42:13 18 eight, nine, ten years until these -- because the trees
10:42:18 19 are going to grow six inches to a foot a year until they
10:42:21 20 get up to be 15, 16, 17 feet tall. And this is what
10:42:26 21 you try to recreate. So you've got everything up to
10:42:31 22 the time you plant, and then you have the waiting period
10:42:34 23 until it's back to where it was before it was taken
10:42:38 24 down. Does that answer your question?

10:42:40 25 Q. Yes. Now, since the area is now wet in the back

10:42:46 1 of these lots, would that problem have to be solved
10:42:50 2 first?

10:42:52 3 A. Very definitely because --

10:42:54 4 MR. BAHRET: Your Honor, I object. There's
10:42:56 5 no foundation to suggest it wasn't wet before. In
10:42:59 6 fact, the testimony is that it was.

10:43:03 7 MR. ROBON: The testimony was it was wet
10:43:06 8 before they put the subdivision in there. There's no
10:43:08 9 testimony it was wet after the subdivision was put in
10:43:12 10 and they had the storm drains.

10:43:13 11 THE COURT: Again, we'll keep counsel's
10:43:15 12 remarks to a minimum. Perhaps you can rephrase to say
10:43:18 13 if the testimony shows or assuming, and then incorporate
10:43:23 14 that.

10:43:25 15 BY MR. ROBON:

10:43:25 16 Q. Assuming, Mr. Herrett, that there is standing
10:43:28 17 water in certain spots along the rear of those lots,
10:43:31 18 could you plant vegetation in standing water where water
10:43:36 19 normally ponds?

10:43:37 20 A. No, you could not and have any success.

10:43:40 21 Q. It would die?

10:43:41 22 A. Yes, it would.

10:43:44 23 Q. Now, my next question is, in order to try and
10:43:48 24 make the vegetation more visible, if fill dirt was
10:43:56 25 brought in and put a wall of seven, eight feet of fill

10:44:03 1 dirt, could you plant on top of the fill dirt, or would
10:44:05 2 it be more or less difficult?

10:44:06 3 A. I think you could plant on the fill dirt, but in
10:44:10 4 this particular situation that you're talking about it's
10:44:14 5 very, very crucial to bring in soil that is what most of
10:44:19 6 us would refer to as topsoil as opposed to if you did an
10:44:26 7 excavation job, regardless of whether it came from a
10:44:28 8 house or a building or a highway construction. Our
10:44:33 9 soils have the A horizon, which is the topsoil, the B
10:44:37 10 horizon, which is not as good of soil, but it's down to
10:44:42 11 where our roots get into it, then we have the C horizon
10:44:45 12 of soil. So often fill, the type that you might be
10:44:50 13 referring to, is the C horizon soil, which just simply
10:44:56 14 doesn't grow hardly anything. It's just soil that is
10:45:01 15 not yet developed to the point where it has enough
10:45:05 16 organic materials, et cetera, et cetera, in it where it
10:45:08 17 can grow. So you've got to bring in good soil. And
10:45:12 18 if you bring in good soil, then planting could be done
10:45:15 19 on that.

10:45:15 20 Q. Could you bring in, for example, six or eight
10:45:18 21 feet of fill dirt, clay, and then put another couple
10:45:25 22 feet of topsoil on top? Would that work?

10:45:30 23 A. I think it would work, but here again, I don't
10:45:33 24 like the fact that you're only talking about a couple of
10:45:38 25 feet of topsoil and then having clay underneath it

10:45:43 1 because when I dig a tree, when I dig a hole to plant a
10:45:47 2 tree of the six-foot category, I've already dug a hole
10:45:54 3 two-feet deep. So now I'm setting the ball, if I'm
10:45:59 4 doing it this way, right on the top of C horizon type of
10:46:07 5 clay soil. So I'd prefer to have it much deeper if
10:46:11 6 possible. So therefore it would require more good soil
10:46:17 7 if you're going to get accelerated growth and not make
10:46:21 8 the root systems have to turn away from this soil. We
10:46:24 9 can't watch this under the ground, but that is what
10:46:27 10 would happen. They would turn and come back up to the
10:46:29 11 surface. So it would be better if we had it much
10:46:33 12 deeper than two feet.

10:46:34 13 Q. Explain to the jury what you came up with with
10:46:39 14 regard to the tree planting. What conclusions, based
10:46:45 15 upon a reasonable arborist certainty?

10:46:52 16 A. I tried to incorporate the various activities
10:46:55 17 that I have already explained to you. So I don't go all
10:46:59 18 over them again, number one, I cleaned the area up as
10:47:03 19 best I could, got all the wooding and other things out
10:47:07 20 of there. Number 2, I took soil tests. Number 3, if
10:47:10 21 the soil needed any nutrient requirements, et cetera, et
10:47:14 22 cetera, I would take care of those things. And
10:47:17 23 undoubtedly in tree planting of this sort you would need
10:47:22 24 to do that type of thing. And then I went and tried to
10:47:26 25 select various different trees that I thought would grow

10:47:30 1 in this area. And then I factored into this additional
10:47:35 2 years of growing, hoping that everything stayed alive,
10:47:39 3 kept growing, and didn't have too much failure. But
10:47:42 4 I've found in my tree planting programs, not necessarily
10:47:46 5 around the yard, but that you can count on the first
10:47:54 6 year you do a planting, no matter how hard you work on
10:47:57 7 it, if you don't have artificial watering, you're going
10:48:01 8 to be lucky to have a 75 percent survival rate. So you
10:48:06 9 plant 100 trees, and they cost X number of dollars, and
10:48:11 10 75 of them live, and 25 of them die. So then you have
10:48:15 11 to go back and you have to buy 25 more to put in those
10:48:18 12 opening holes. If watering could be done, this might
10:48:22 13 be prevented. And so then you do your second planting,
10:48:26 14 and you might have a 75 -- and it varies.

10:48:29 15 I mean, I've just kind of hit on a 75 percent
10:48:32 16 number because I've had failures already of almost 100
10:48:37 17 percent when I planted 3,000 and 4,000 trees. And it's
10:48:41 18 just disastrous.

10:48:43 19 But to go back to the point, I've incorporated
10:48:47 20 the things that I said. And then we picked out the tree
10:48:49 21 species; we determined how much they might cost.

10:48:53 22 And then we decided, okay, we're going to plant
10:48:56 23 these across 500 feet or thereabouts of soil.

10:48:59 24 Q. We covered the 500 feet where the lot, that's
10:49:02 25 where the area was shown on the survey?

10:49:05 1 A. That's correct. And I don't have my memory, but
10:49:08 2 I think it starts with lot number 14 or something -- 15,
10:49:14 3 and it goes 15, 14 -- it goes backwards across until we
10:49:19 4 get to the north.

10:49:22 5 THE COURT: Counsel, help me out. 500 feet
10:49:25 6 covers lot 15 through what, please?

10:49:28 7 MR. ROBON: I think 12.

10:49:31 8 Q. 12, 13, 14, and 15?

10:49:34 9 A. And that represented, I believe, 500 feet.

10:49:37 10 THE COURT: Thank you.

10:49:38 11 Q. And what kind of dollar figure and species did
10:49:42 12 you come up with?

10:49:45 13 A. I came up with dollar figures of in the
10:49:47 14 neighborhood of -- and if I may refer to my note. It
10:49:51 15 was \$250 per running foot. I multiplied that \$250.
10:50:03 16 Keep in mind that's not just the tree; that's all the
10:50:06 17 other things that we incorporated into it, hiring
10:50:10 18 outside companies and such to come in and do all the
10:50:15 19 land clearing, all the soil testing.

10:50:18 20 Q. But it doesn't include any soil being brought?

10:50:21 21 A. It does not include any soil. It's using the
10:50:24 22 soil we have there. That would be an extra cost
10:50:26 23 incurred.

10:50:29 24 So you multiply that \$250 a running foot, which
10:50:34 25 seemed too high to me in the beginning until I

10:50:37 1 incorporated all the things into it that I know have to
10:50:40 2 be incorporated to try to get a successful planting the
10:50:43 3 first time around. Multiplied that, came up with
10:50:47 4 \$125,000 for the total footage across the back of the
10:50:51 5 property.

10:50:51 6 Now, there were no less than nine trees of some
10:51:00 7 consequence, six, eight, nine, ten, 11 inches or more in
10:51:06 8 diameter that were also cut down across the back of the
10:51:10 9 property. So I used information that I use in doing
10:51:17 10 tree appraisal from Michigan State University's forestry
10:51:22 11 and horticultural department and tried to do some
10:51:26 12 valuation on trees of that diameter, not pinpointing
10:51:32 13 what specie of tree they were. And I just rounded the
10:51:36 14 number to \$1,000 a tree. So I added that \$9,000 to the
10:51:41 15 \$125,000 and came up with \$134,000 that it would take to
10:51:50 16 replace that with a living windbreak across the back,
10:51:58 17 wildlife habitat, sound barrier, et cetera.

10:52:01 18 Now, I divided the \$134,000 by the -- I believe
10:52:07 19 we said four lots, Your Honor, that was what we came up
10:52:10 20 with, and that represented \$33,500.

10:52:19 21 Q. For each lot?

10:52:20 22 A. Per lot that it would cost to put -- replace the
10:52:26 23 living vegetation wall across the back that we had.
10:52:29 24 Now, that figure is directly related to the four lots
10:52:37 25 that the 500 feet entails. But if you would have

10:52:45 1 available the chart that we looked at --

10:52:50 2 Q. The plat map?

10:52:51 3 A. The map that shows -- if you could show the jury,
10:52:56 4 please.

10:52:57 5 Q. If you could come over here, we'll pull it out.

10:53:02 6 A. Okay. Thank you.

10:53:04 7 Q. We're referring to Exhibit Number 8.

10:53:20 8 A. We started down here. We started right down
10:53:25 9 here, and we came across here, 15, 14, 13, 12, 11. And
10:53:30 10 this is where the trees were taken out. Now --

10:53:35 11 MR. BAHRET: Your Honor, I'd ask for at
10:53:39 12 least a cautionary instruction. He's not an expert in
10:53:42 13 where trees were taken out.

10:53:44 14 MR. ROBON: What he's basing his opinion on
10:53:47 15 is the survey.

10:53:47 16 THE COURT: We not have established that
10:53:49 17 yet.

10:53:49 18 MR. BAHRET: And the survey doesn't show --

10:53:52 19 THE COURT: Right now we have discussion
10:53:54 20 about removal and replacement. But there's been no
10:53:59 21 testimony from this witness that I can recall about
10:54:04 22 where, with respect to the surveys, he's talking about.

10:54:11 23 BY MR. ROBON:

10:54:11 24 Q. Well, how did you determine, Mr. Herrett, 12, 13,
10:54:16 25 14, and 15? Did you take a look at the survey, which is

10:54:19 1 Exhibit Number 7?

10:54:21 2 A. Yes, I did. And I have that in my possession in
10:54:24 3 my folder. So I took -- Your Honor, I took the area
10:54:28 4 that was surveyed, which it shows in the pink color
10:54:33 5 across here, and I tried to, as best I could, to stay
10:54:37 6 within the perimeters of that area across there.

10:54:40 7 THE COURT: How long and how wide? We're
10:54:42 8 talking 500 feet long. How wide?

10:54:46 9 THE WITNESS: 500 feet long. It varied
10:54:48 10 from about four and a half to six feet in width to the
10:54:51 11 best of my knowledge.

10:54:54 12 THE COURT: Thank you.

10:54:59 13 A. Now, when you come up with the fact that this,
10:55:02 14 whatever the width may be, trees were taken out of here
10:55:05 15 on the development's property, then I said, as I looked
10:55:10 16 at this, I said, well, how would this affect me if I
10:55:13 17 lived someplace else rather than here, here, here and
10:55:17 18 this right here. And so I got to looking at the area.
10:55:21 19 I walked over and I stood there and I walked over to
10:55:24 20 different lots and I looked around. And right away I
10:55:28 21 could determine in my own mind's eye it might vary if
10:55:32 22 you looked at it or if somebody else looked at it. But
10:55:34 23 I felt that this lot that had a nice view across here,
10:55:37 24 this lot across the street, this lot across the street,
10:55:41 25 this lot across the street, and this lot across the

10:55:45 1 street all had views of this area that were affected by
10:55:50 2 what had been removed across here. You understand what
10:55:54 3 I'm saying, Your Honor? I'm saying that these lots
10:55:57 4 across the street also had straight across or angular
10:56:02 5 view of what had happened over here. So I took the
10:56:07 6 \$33,000-plus number, \$33,500 figure that affected these
10:56:13 7 lots, and I multiplied it by these four lots, plus one,
10:56:20 8 two, three, four, five lots across the road which
10:56:24 9 directly were affected by this. Now, there is a house
10:56:27 10 here, that still has a woods behind it, so I did not
10:56:30 11 include that. And that's how I came up with my figure,
10:56:33 12 which is around \$301,000, or something like that. It's
10:56:37 13 in my notes up there. If you have any questions, I can
10:56:40 14 go back, and I'd be glad to look at those numbers.

10:56:45 15 Q. Now, you know --

10:56:46 16 MR. BAHRET: Your Honor, could we --

10:56:49 17 THE COURT: Time out. We have an
10:56:50 18 objection.

10:56:51 19 MR. BAHRET: I think we should do this in
10:56:53 20 question and answer form.

10:56:53 21 THE COURT: There's no question pending.
10:56:55 22 I'm going to ask you to confine your answers to
10:56:59 23 questions. We don't usually allow long narratives.
10:57:02 24 Let's allow the lawyer to ask a question, and you can
10:57:04 25 given an answer. Thank you kindly.

10:57:06 1 Q. Tell us how you came up with a total valuation of
10:57:10 2 what the value of the trees that were behind the four
10:57:12 3 lots and how it impacted the lots across the street.

10:57:21 4 A. I think I covered most of that.

10:57:22 5 MR. BAHRET: I object. There's no
10:57:24 6 foundation that he knows land value. He's an arborist.

10:57:30 7 MR. ROBON: I'll rephrase the question.

10:57:32 8 Q. Do you value trees?

10:57:34 9 A. Yes, I do.

10:57:35 10 Q. And can you explain how a person goes about
10:57:40 11 valuing trees, shrubbery, what do you look at?

10:57:46 12 A. You look at the specie, you look at the effect it
10:57:51 13 has on the surrounding area, you look at why the trees
10:57:56 14 and shrubs and vines and stuff might be there, what
10:58:00 15 purpose are they serving, are they there for a number of
10:58:06 16 reasons, which in this particular case I felt they were.
10:58:09 17 I think I've mentioned those: From wildlife habitat, to
10:58:13 18 sound barriers, to vision barrier, whatever. And this
10:58:17 19 is how I try to value trees and shrubs and bushes and
10:58:22 20 vines.

10:58:22 21 Q. And Michigan State University, I understand,
10:58:26 22 publicizes a recognized journal of valuations?

10:58:31 23 A. That's correct. They're not the only one, but
10:58:34 24 they're the ones I use.

10:58:35 25 Q. And in their journal --

10:58:39 1 MR. BAHRET: Objection.

10:58:42 2 MR. ROBON: I thought you said something.

10:58:44 3 MR. BAHRET: I did. I objected.

10:58:46 4 THE COURT: He objected. Your basis is
10:58:50 5 leading?

10:58:51 6 MR. BAHRET: Obviously, yes.

10:58:53 7 MR. ROBON: I'll rephrase the question.

10:59:08 8 BY MR. ROBON:

10:59:08 9 Q. Would you explain to the jury how, for example, a
10:59:13 10 one-foot in diameter oak tree that's 50 feet tall would
10:59:18 11 have a different value behind a house as compared to
10:59:23 12 being in a woods?

10:59:25 13 A. If I --

10:59:26 14 Q. Sort of an understanding of how things are
10:59:30 15 valued.

10:59:31 16 A. If I had a 12-inch diameter oak tree, as you
10:59:36 17 asked about, standing in a woodland where it was not
10:59:40 18 used for shade or anything as far as my yard or house
10:59:45 19 was concerned, it could be a \$100 tree. If I have that
10:59:51 20 same 12-inch diameter tree in my yard, I have had many
10:59:57 21 cases where automobiles have gone off the road and run
11:00:01 22 into a tree like that, and then I've gone to my
11:00:03 23 valuation information material and appraised what that
11:00:08 24 tree might be worth because it's in my yard; it adds to
11:00:13 25 the value of my house; it adds to the value of my living

11:00:17 1 environment, the shade, a place to hang a swing from a
11:00:22 2 limb, or whatever you want to do with it. And it's not
11:00:24 3 unusual for a tree like that to be worth \$4,000 or
11:00:28 4 \$5,000, \$6,000, depending on the specie and the location
11:00:32 5 where it is in your yard.

11:00:34 6 Q. Can you explain to jury the methodology that you
11:00:37 7 used in coming up with the \$250 a foot and the valuation
11:00:44 8 that you ultimately put not only affects four lots, but
11:00:49 9 affecting the lots across the street?

11:00:52 10 A. Well, I think I covered that as best as I could.
11:00:59 11 But I went down the ABCs of cleaning the area up --

11:01:06 12 THE COURT: He already covered that.

11:01:09 13 THE WITNESS: That's what I thought, Your
11:01:10 14 Honor.

11:01:10 15 THE COURT: Then let's move on.

11:01:12 16 Q. So my question is, did you use that methodology
11:01:16 17 of the location of the trees and the brush and the
11:01:20 18 brambles in your valuation?

11:01:21 19 A. Yes, I did. Very much so.

11:01:24 20 Q. And what, in particular, stood out that you put
11:01:28 21 such a high value on the loss of that vegetation?

11:01:32 22 A. Well, if I were to buy or own one of those lots,
11:01:40 23 and I had the privilege of having a wildlife sanctuary
11:01:45 24 and sound barrier and vegetation and
11:01:51 25 whatever-it-might-be barrier behind my lot, and that's

11:01:54 1 what I looked at, whether the leaves were on in the
11:01:57 2 summertime or off in the wintertime -- I have seen quite
11:02:03 3 a few photographs of this area. Here again, it's in the
11:02:06 4 eyes of the beholder. But I would much rather look at
11:02:09 5 that than I would at the side of a railroad car. Some
11:02:15 6 of those railroad cars do have some interesting
11:02:17 7 paintings and such on them, but that's another point.
11:02:21 8 But that's what I used to determine what I felt was the
11:02:25 9 value of having them there, the trees.

11:02:29 10 Q. In the \$301,000 value that you came up with, what
11:02:33 11 kind of species would you plant to replace them, even
11:02:38 12 though they would only be six or so feet high initially?

11:02:42 13 A. Again, in this particular soil type, I would
11:02:47 14 probably stick with hardwood species that were adapted
11:02:50 15 to the soil type. I selected certain ones like
11:02:53 16 sweetgum, and I did mention earlier red cedar, if I
11:02:59 17 wanted to mix a coniferous type of tree -- and a conifer
11:03:04 18 is an evergreen tree that bears its seeds, for the sake
11:03:09 19 of the jury to understand what that is. And I picked
11:03:13 20 some pin oak, which is adapted to that soil type. And
11:03:16 21 then I took some other vegetation such as autumn olive
11:03:22 22 and some other smaller branch which are wildlife habitat
11:03:27 23 friendly food sources and such. And that's what I came
11:03:30 24 up with.

11:03:31 25 Q. Now, would you plant these trees -- how close

11:03:34 1 would they be planted to one another, or they would be
11:03:37 2 outside the four or five foot area even?

11:03:39 3 A. Some would be in the four or five foot area.
11:03:42 4 Then the others would encroach upon the depth of the lot
11:03:46 5 because you couldn't put all those back in there. But
11:03:49 6 I'm trying -- I think a person needs to try to recreate
11:03:54 7 a barrier in close proximity to what was there before.
11:04:00 8 And I can't exactly tell from looking at some of the
11:04:03 9 pictures and the videos and the photographs that I
11:04:07 10 looked at whether that was ten or 15 feet wide. But
11:04:10 11 I'm guessing it was every bit that wide. And so I
11:04:13 12 would incorporate the back part of the lot, which is
11:04:18 13 four, five, six feet across there, and then add another
11:04:22 14 four or five, six feet to that.

11:04:25 15 Q. And your opinion based upon a reasonable degree
11:04:29 16 of certainty, it would take how many years from the time
11:04:33 17 of planting these trees until they would be, let's say,
11:04:37 18 15 to 20 feet tall?

11:04:38 19 A. I can't entirely answer that question for you,
11:04:42 20 for the simple reason I don't know what the soil types
11:04:45 21 are and such. But I'm just guessing that to get up to
11:04:50 22 the 15, 18 --

11:04:51 23 MR. BAHRET: Objection.

11:04:52 24 THE COURT: I'm sorry, sir.

11:04:53 25 A. Yes, it would be ten years.

11:04:55 1 THE COURT: I instruct the jury to disregard
11:04:57 2 the answer. We cannot have witnesses guessing. So if
11:05:00 3 you don't know, you simply say, I don't know.

11:05:02 4 A. I don't know.

11:05:04 5 Q. Well, for example, how fast does a conifer grow?
11:05:09 6 If you plant one that's six feet high -- you said that
11:05:14 7 was one of the species that you might plant?

11:05:16 8 A. Six to ten, 12 inches a year, under the best
11:05:21 9 growing conditions.

11:05:24 10 Q. And what about the pin oaks that you mentioned?

11:05:27 11 A. Six inches or eight inches or so a year.

11:05:31 12 Q. So most of the trees would be something around a
11:05:36 13 foot per year on average?

11:05:38 14 A. I think that would be a rather excessive amount
11:05:42 15 of growth, but it's certainly possible, but I think it
11:05:46 16 would be more to six to eight inches of growth a year.

11:05:49 17 Q. And if they were watered, would it be more?

11:05:53 18 A. It wouldn't be a whole lot more. The survival
11:05:56 19 rate would just be better. And it could be a little
11:05:59 20 bit more, definitely.

11:05:59 21 Q. So can you estimate for the jury how many years
11:06:03 22 it would be before it would be a barrier to cover, for
11:06:09 23 example, the bottom of the railroad tracks?

11:06:12 24 MR. BAHRET: Your Honor, he already told you
11:06:14 25 that he was guessing and he doesn't know. I object.

11:06:20 1 THE COURT: Well, let's hear it. Can you
11:06:22 2 answer the question with some --

11:06:25 3 A. I believe I can shed some light on that. Here
11:06:28 4 again --

11:06:28 5 THE COURT: Without guessing.

11:06:29 6 A. It's not 100 percent, but I stated I'm very
11:06:33 7 confident that those trees would grow six to eight
11:06:37 8 inches a year. And so just multiply six inches by ten
11:06:41 9 years, and how much have you got as far as your added
11:06:45 10 growth is concerned?

11:06:46 11 MR. ROBON: Five feet.

11:06:47 12 A. That's a right. So you plant a six foot tall
11:06:51 13 tree, and you've got five feet more added to it.
11:06:54 14 You've got an 11-foot tall tree.

11:06:57 15 Q. In five years?

11:06:58 16 A. So that's the best I can do for you.

11:07:01 17 Q. Do you believe that the valuation you gave the
11:07:04 18 jury of the original \$134,000 for the four lots, and
11:07:08 19 then putting it on a per-lot basis, and then adding the
11:07:12 20 lots across the street is a proper method of determining
11:07:15 21 valuation?

11:07:17 22 A. Yes, I do, or I wouldn't have used that system.
11:07:21 23 It's as best as I knew what to come up with.

11:07:28 24 MR. ROBON: Nothing further, Your Honor.

11:07:29 25 THE COURT: Thank you. You may cross.

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ROGER HERRETT, CROSS-EXAMINATION

BY MR. BAHRET:

Q. Good morning. My name is Bob Bahret; I represent the City of Toledo.

A. Good morning.

Q. Interesting methodology. Who told you a barrier ten- or 15-foot thick existed?

A. I determined that by my looking at the survey line and seeing how much was on the side of the subdivision, and then I had the opportunity to look at a video that --

Q. So in your work, in your estimate of a ten- to 15-foot barrier, you would admit that you're including vegetation and trees that were on railroad property?

A. No, I used that to determine how much width I would have to plant if I was going to plant that onto the subdivision's property to replace what was not -- you know, which was part of the total width in the first place.

Q. We're not communicating. The total width that you say you're trying to model to replace includes trees and vegetation that's on the railroad or was on the railroad property, correct?

A. I don't think we're still communicating. I see

11:08:58 1 what I think you're trying to ask me. But you're
11:09:01 2 trying to say that the value that I came up with of \$250
11:09:06 3 a foot or \$300,000 --

11:09:09 4 Q. Let's go one step at a time. I'm trying to find
11:09:11 5 out the basis for what you've said. The 15-foot
11:09:14 6 barrier that you say existed before, are you aware of
11:09:19 7 the fact that absolutely nobody claims that there was an
11:09:23 8 encroachment on Cambridge anywhere near that deep?

11:09:28 9 A. Yes, I believe I'm aware of that.

11:09:32 10 Q. All right. So if we have by one witness's
11:09:37 11 standard a four-foot encroachment, there's 15 feet of
11:09:42 12 barrier that you're trying to replace, if I do the math,
11:09:47 13 I've got 11 feet on railroad property. Does that make
11:09:51 14 sense to you?

11:09:52 15 A. That's correct. It could vary from 11 to 12,
11:09:56 16 whatever the width was.

11:09:58 17 Q. And you are including that, those trees that are
11:10:01 18 gone, into the equation and the analysis as to what you
11:10:06 19 are trying to replace?

11:10:08 20 A. No, I'm not.

11:10:09 21 Q. Well, you've just told us a few times you're
11:10:12 22 trying to create a 12- or 15-foot thick barrier.

11:10:17 23 A. Yes, but I'm not using the value of the trees
11:10:20 24 over on what was the City's or railroad's property.
11:10:24 25 I'm just saying if I put that same planting over on the

11:10:27 1 subdivision's property, and tried to emulate what was on
11:10:30 2 the other side, to come up with that width, yes, I'm
11:10:35 3 using that as a value factor, but I'm certainly not
11:10:39 4 including the value of the trees there.

11:10:42 5 Q. You're including it in the cost to replace the
11:10:45 6 barrier, though; are you not?

11:10:46 7 A. I am.

11:10:47 8 Q. All right. So you're charging, if you will, the
11:10:51 9 City of Toledo to rebuild a 15-foot barrier, even though
11:10:56 10 they didn't have a 15-foot barrier contained within
11:10:59 11 their own property; is that right?

11:11:00 12 A. I think you'd -- I'd have to agree with that.

11:11:04 13 Q. And another interesting part of the analysis is
11:11:09 14 that you are including lots -- you're including lots --
11:11:22 15 I'll show you first then show the jury. All these lots
11:11:26 16 on the other side of the street?

11:11:28 17 A. I'm not including all of them, just down to
11:11:30 18 number four.

11:11:32 19 Q. Four, five, six, seven, and eight?

11:11:34 20 A. That's correct. Looking at the back of the
11:11:38 21 board, I believe that's what it was.

11:11:40 22 Q. Can you come back up here?

11:11:42 23 A. Yes, I could.

11:11:54 24 Q. You're including all of these lots, four through
11:11:57 25 eight?

11:11:57 1 A. Correct.

11:11:58 2 Q. You would admit that all of these lots would be
11:12:03 3 able to see a train looking out over lots 12, 11, 10,
11:12:09 4 and 9?

11:12:13 5 A. These lots over here you're saying would be able
11:12:17 6 to see a train?

11:12:18 7 Q. No.

11:12:19 8 A. Yes, they would be able to see a train, but the
11:12:23 9 cutting is here.

11:12:24 10 THE COURT: Folks, but in fairness to this
11:12:27 11 witness --

11:12:28 12 THE WITNESS: He's confusing me.

11:12:29 13 THE COURT: Just a moment, sir. My point
11:12:31 14 is, you both can't be talking at the same time because
11:12:34 15 we can't then understand, and most importantly, perhaps,
11:12:38 16 our court reporter can't accurately take down the
11:12:41 17 question and the answer. I'm going to ask the witness
11:12:44 18 to please wait until the question is asked. I'm going
11:12:47 19 to ask the lawyer to wait until the question is
11:12:49 20 answered. You may proceed.

11:12:52 21 THE WITNESS: Will do. Thank you.

11:12:54 22 BY MR. BAHRET:

11:12:54 23 Q. I know you're talking about what's down here. I
11:12:57 24 understand that. I'm asking you, would they be --
11:13:01 25 somebody that lives in lot 5, if he just looks in this

11:13:05 1 direction instead of this direction, he's going to see a
11:13:08 2 train, correct?

11:13:08 3 A. Correct.

11:13:11 4 Q. Of course, there's some negative aesthetics with
11:13:15 5 that?

11:13:16 6 A. What might those negative aesthetics be?

11:13:19 7 Q. You already told us you don't like to look at
11:13:21 8 trains.

11:13:21 9 A. That's correct. Not if I have an option.

11:13:24 10 Q. Now, you are ascribing value the way you've
11:13:28 11 worked this up, damages to each of these lots, correct?

11:13:31 12 A. Yes, sir.

11:13:32 13 Q. You're not proposing planting anything on those
11:13:35 14 lots; you're just saying those are damaged the same --
11:13:40 15 by the same number that it would cost to replace what
11:13:43 16 was supposedly taken down here?

11:13:44 17 A. That's correct.

11:13:45 18 Q. All right. Who gets the money?

11:13:48 19 A. Who gets what money?

11:13:50 20 Q. The money that you're saying these lots are
11:13:52 21 damaged.

11:13:53 22 A. I suppose the person who owns the lots that sells
11:13:56 23 them.

11:13:57 24 Q. Does IT concern you that some of these people
11:13:59 25 aren't even parties to this case?

11:14:01 1 A. I'm not aware of that.

11:14:03 2 Q. Okay. Do you know that -- sorry.

11:14:09 3 (Cellular telephone is ringing in the courtroom.)

11:14:24 4 MR. BAHRET: This would be a good time for
11:14:26 5 everybody to stand up and salute.

11:14:29 6 THE COURT: This would be a good time for
11:14:31 7 the marshals to confiscate your cell phone.

11:14:36 8 THE WITNESS: I'm a Michigan State fan.
11:14:38 9 Please.

11:14:40 10 BY MR. BAHRET:

11:14:40 11 Q. Before we were interrupted --

11:14:42 12 MR. BAHRET: I do apologize, Your Honor.
11:14:43 13 Believe it or not, that's never happened to me.

11:14:46 14 THE COURT: Sure.

11:14:52 15 THE WITNESS: What, that Michigan lost? Is
11:14:54 16 that what you're trying to say.

11:14:56 17 MR. BAHRET: Let's not go there.

11:14:59 18 THE WITNESS: Let's not.

11:15:01 19 MR. BAHRET: But it's a good rivalry,
11:15:03 20 though.

11:15:03 21 BY MR. BAHRET:

11:15:04 22 Q. You are ascribing value up here, damages, I
11:15:06 23 should say, to lots 5 through 8 based on what was cut
11:15:11 24 down on somebody else's property?

11:15:14 25 A. Yes, I am.

11:15:15 1 Q. All right. Do you -- you can go ahead and take
11:15:18 2 your seat.

11:15:20 3 Do you take the position that if your next-door
11:15:23 4 neighbor has a tree that you like, and he cuts it down
11:15:29 5 even though you didn't want him to cut his own tree
11:15:32 6 down, that you have a damage claim or somebody owes you
11:15:35 7 money?

11:15:37 8 A. No, I'm not saying that at all. It happens
11:15:40 9 quite frequently.

11:15:41 10 Q. All right. And you would obviously admit that
11:15:44 11 nothing was removed from lots 4, 5, 6, 7 and 8?

11:15:51 12 A. Nothing was removed from that property except the
11:15:54 13 view across the street.

11:15:56 14 Q. Nothing was removed from the lots that I
11:15:58 15 mentioned?

11:15:59 16 A. No, they were not. There was not.

11:16:05 17 Q. And so when you talk about replacing for the
11:16:09 18 money that you claim it takes, replacing the barrier
11:16:18 19 down on lots 15 and 14 and 13, I guess it is, that
11:16:24 20 replacement and the monies that you spend on that
11:16:26 21 replacement would also fix lots 4, 5, 6, 7 and 8,
11:16:33 22 correct?

11:16:35 23 A. Yes.

11:16:36 24 Q. So it's one replacement we're talking about. We
11:16:40 25 don't have to add and triple the money to replace it

11:16:43 1 three times, do we?

11:16:47 2 A. I'm saying that each person in my opinion on
11:16:52 3 these lots 4, 5, 6, 7, 8, whatever, have been damaged.
11:16:59 4 The fact that they have lost or gained --

11:17:03 5 Q. We heard that. But that's not the question.

11:17:05 6 THE COURT: Let's let him finish.

11:17:07 7 MR. BAHRET: It wasn't responsive to the
11:17:09 8 question.

11:17:09 9 THE COURT: Well, yes and no. Are you
11:17:09 10 done?

11:17:15 11 A. My point being is when you have something across
11:17:17 12 the street on the back of that that opens up the
11:17:20 13 neighborhood to that type of exposure, that you have
11:17:23 14 been damaged, in my opinion.

11:17:33 15 Q. I was asking about the replacement cost.

11:17:35 16 A. The replacement cost is involved with planting
11:17:41 17 the trees on the four lots that we mentioned, trees,
11:17:44 18 shrubs, whatever we plant, and what it affects.

11:17:48 19 Q. To fix what you claim was done to the property,
11:17:52 20 it would cost \$134,000, and that includes replacing 11
11:18:00 21 feet of trees and vegetation that even you admit wasn't
11:18:05 22 even on Cambridge property. Am I right?

11:18:08 23 A. No.

11:18:11 24 Q. In the cost estimate you gave, and I thought we
11:18:14 25 already established this, you are creating a 15-foot

11:18:19 1 barrier. You said that. Do you stand by that?

11:18:23 2 A. I'm creating a 15-foot wide barrier over on
11:18:27 3 property that belongs to the subdivision, not on
11:18:30 4 property that belongs to somebody else.

11:18:32 5 Q. You know, I didn't even ask if you're creating a
11:18:34 6 barrier on somebody else's property. Nobody heard me
11:18:37 7 ask that.

11:18:38 8 A. You said I'm recreating a barrier.

11:18:41 9 Q. A 15-foot barrier, when they only claim a
11:18:44 10 four-foot encroachment, which means the other 11 feet
11:18:47 11 that you are replacing was never on the development
11:18:51 12 property.

11:18:52 13 MR. ROBON: Objection, Your Honor. I think
11:18:54 14 the testimony of Mr. Nigh was five to six feet.

11:18:59 15 THE COURT: Four, five, six feet. About
11:19:02 16 five feet. Can we get you two to agree on that? About
11:19:06 17 five feet.

11:19:07 18 So that we're at about ten feet. And amend
11:19:11 19 the question therefore. I think the question is, ten
11:19:14 20 feet.

11:19:15 21 BY MR. BAHRET:

11:19:15 22 Q. Two-thirds of what you're talking about
11:19:18 23 replacing, I know you're not going to put it back on
11:19:21 24 railroad property, but that's where it was when it was
11:19:24 25 cut down, two-thirds of what you're talking about

11:19:27 1 replacing, correct?

11:19:34 2 THE COURT: Let me try it this way.

11:19:37 3 THE WITNESS: Go ahead, Your Honor.

11:19:39 4 Please.

11:19:39 5 THE COURT: You first.

11:19:47 6 A. My cost estimates that I came up with were to
11:19:52 7 recreate a windbreak within the four-, five-, six-,
11:19:58 8 seven-, eight-foot distance across the back of that lot.
11:20:02 9 I never thought about ten to 15 feet. I did not think
11:20:06 10 about recreating a total width of what had been taken
11:20:09 11 off of railroad and subdivision property. My figures
11:20:15 12 are, let's say, within the six-foot distance from the
11:20:19 13 back of the property and onto the subdivision. So I
11:20:24 14 may -- I may be adding a foot or a foot and a half or
11:20:27 15 two feet, but not any ten or 12 feet.

11:20:32 16 Q. You know, everyone in this room heard you say it,
11:20:35 17 though.

11:20:35 18 A. Say what?

11:20:36 19 Q. About a 12- to 15-foot barrier, that's why you
11:20:41 20 would need to go onto the property, onto the Cambridge
11:20:44 21 property much deeper than just four feet?

11:20:46 22 A. Yes, I did say that. And if I were going to
11:20:48 23 plant it, that's what I would do. But that's not where
11:20:51 24 my cost figures came from.

11:20:53 25 Q. So the other planting is free?

11:20:55 1 A. No, the other planting is going to cost more
11:20:57 2 money, but we're not -- that's going to be a decision
11:21:01 3 made by whoever owns that property, a developer if he
11:21:04 4 wants to go that wide. I'm not -- I have not been asked
11:21:09 5 to tell that individual or anybody else how much more
11:21:13 6 it's going to cost.

11:21:15 7 Q. Let me switch gears. You were asked about how
11:21:18 8 fast trees grow?

11:21:20 9 A. Yes.

11:21:21 10 Q. Do you have expertise in how fast weeds and scrub
11:21:25 11 brush and brambles grow?

11:21:27 12 A. A certain extent. Not weeds and grass, but I do
11:21:31 13 on brambles and briars.

11:21:32 14 Q. Brambles and briars are much faster growing than
11:21:36 15 a tree; would they not?

11:21:37 16 A. In most cases.

11:21:39 17 Q. And also there's a limit to how tall brambles and
11:21:44 18 briars get?

11:21:45 19 A. That's entirely true, depending on what they have
11:21:48 20 to hang onto when they're growing.

11:21:50 21 Q. Well, if they don't have anything to hang on,
11:21:53 22 they're just out there growing, how tall do they
11:21:56 23 typically get?

11:21:57 24 A. Oh, probably in the neighborhood -- depending on
11:22:00 25 the species of brambles an briar, somewhere around six,

11:22:05 1 eight feet.

11:22:06 2 Q. I never heard of anybody saying they're going to
11:22:09 3 plant brambles, but is that something you can plant?

11:22:12 4 A. Well, it depends on what you call brambles, but
11:22:14 5 for many, many years the Division of Wildlife, until it
11:22:18 6 became illegal, planted multiflora rose around farmers'
11:22:21 7 fields until that -- and the other thing, until they
11:22:25 8 determined it was a noxious plant and spread all over
11:22:28 9 the place. But it's a great wildlife habitat and
11:22:31 10 living fence. I'm not advocating planting multiflora
11:22:35 11 rose. It would grow that height.

11:22:37 12 Now, there are plants like autumn olive, like I
11:22:41 13 mentioned, and some of the same ones I mentioned that
11:22:43 14 will grow to a similar height to multiflora rose. I
11:22:48 15 have some of those grow to six to eight feet. I have
11:22:52 16 some on my own property.

11:22:53 17 Q. You saw some pictures?

11:22:54 18 A. I saw some pictures. I don't know exactly which
11:22:57 19 ones I saw.

11:22:57 20 Q. And what type of brambles did you see?

11:23:02 21 A. Species-wise, I can't answer that.

11:23:07 22 Q. If -- is that something you can buy? Can you go
11:23:12 23 somewhere and buy a bramble?

11:23:15 24 A. Would you give me the scientific name of what
11:23:17 25 bramble is? I really don't know. Or the common name?

11:23:21 1 I mean, bramble is -- are we talking about wild rose
11:23:25 2 bushes? Are we talking about grape vines? Are we
11:23:29 3 talking about just a tangle of plant life like that
11:23:32 4 which we commonly refer to as brambles, I guess,
11:23:37 5 rabbits' habitat?

11:23:37 6 Q. It's been described as a tangled thing that
11:23:40 7 weaves together.

11:23:42 8 A. Good definition.

11:23:44 9 Q. Can you get those things?

11:23:46 10 A. You can buy the individual plants and plant them
11:23:49 11 and let them do their thing.

11:23:50 12 Q. How long would it take to get them up -- I don't
11:23:53 13 know what size they come when you buy them. How long
11:23:56 14 would it take to create a five- or six-foot tall
11:23:59 15 barrier?

11:23:59 16 A. Well, the bramble that we might go to a nursery
11:24:03 17 and buy, and search out, would probably be a foot or so
11:24:07 18 in height or foot and a half. And so it would probably
11:24:11 19 take another four or five years for them to get up into
11:24:14 20 the height we're talking about.

11:24:15 21 Q. So they're growing at a rate at least a foot or
11:24:19 22 more a year?

11:24:20 23 A. Correct.

11:24:21 24 Q. And probably the "or more" side of that equation,
11:24:24 25 correct?

11:24:24 1 A. Possibly, but not necessarily true.

11:24:31 2 Q. In your estimate that you came up with of
11:24:36 3 \$134,000, I know you factored in nine trees. And are
11:24:41 4 you aware that Nigh only claimed he found seven?

11:24:45 5 A. No, I'm not. I just used --

11:24:48 6 Q. So throw in a couple extra?

11:24:50 7 A. I didn't throw them in. I was just told there
11:24:52 8 were nine. And I had photographs that -- but I can't
11:24:57 9 verify that.

11:24:57 10 Q. In your estimate are you including brambles or
11:25:01 11 the things that I described as brambles?

11:25:04 12 A. No. I did not do an appraisal on what had been
11:25:08 13 removed other than for the trees.

11:25:10 14 Q. And the trees that you're talking about, nine
11:25:14 15 trees, according to your information, to replace the
11:25:21 16 trees is going to cost \$134,000?

11:25:24 17 A. Not to replace the trees. I'm talking trees,
11:25:28 18 the brambles, plus all the preparation work that I
11:25:33 19 described all that before.

11:25:35 20 Q. I thought I just got done asking if you were
11:25:38 21 talking about replacing the brambles. I thought you
11:25:42 22 just told me no?

11:25:45 23 A. I must have misspoke. I'm sorry.

11:25:49 24 Q. And what species are you talking about replacing
11:25:53 25 brambles with?

11:25:54 1 A. I would probably use autumn olive, and other
11:26:00 2 plants very much like the autumn olive plant, which
11:26:04 3 would be able to grow in that soil.

11:26:06 4 Q. What is an autumn olive -- autumn?

11:26:09 5 A. Autumn, autumn of the year.

11:26:12 6 Q. What is an autumn olive plant? What does it
11:26:17 7 look like?

11:26:19 8 A. It looks like a lilac bush in a way, except it
11:26:23 9 grows taller. It has a narrow thin leaf that gross to
11:26:29 10 be about two and half to three inches long. And on the
11:26:32 11 underside of the leaf it's very silvery -- pubescent is
11:26:38 12 the terminology. When the wind blows on them, they
11:26:41 13 have a very attractive color to them.

11:26:45 14 Q. Does it flower?

11:26:46 15 A. Then they have a fruit on them. Yes, it flowers;
11:26:50 16 it has an odor much the same as the honeysuckle.

11:26:54 17 Q. So that's a decorative item?

11:26:56 18 A. Not necessarily. The main objective of planting
11:27:00 19 a plant like that is for the privacy, windbreak, and
11:27:06 20 food quality to bird life.

11:27:08 21 Q. But it is a decorative-type plant?

11:27:13 22 A. I guess you could consider it to be that. It's
11:27:15 23 certainly more attractive than others.

11:27:17 24 Q. Do you know if that's what was on the property
11:27:19 25 before, decorative stuff instead of stuff that just

11:27:23 1 looked like weeds?

11:27:24 2 A. I wouldn't be surprised if there might have been
11:27:27 3 some of that, but I can't say because I never saw it in
11:27:29 4 person.

11:27:29 5 Q. The autumn olive, is that more expensive than
11:27:33 6 just a common old tangled bramble?

11:27:36 7 A. I can't answer that question. I don't know. I
11:27:38 8 never just bought a common old bramble.

11:27:42 9 Q. You didn't analyze that for your cost estimate?

11:27:45 10 A. No, I just went with my what my research told me
11:27:50 11 should be planted there.

11:27:52 12 MR. BAHRET: Thank you.

11:27:54 13 THE WITNESS: You're welcome.

11:27:55 14 THE COURT: Any redirect?

11:27:56 15 MR. ROBON: Just a couple follow-up
11:27:58 16 questions.

11:27:58 17 - - -

11:27:58 18 ROGER HERRETT, REDIRECT EXAMINATION

11:27:59 19 BY MR. ROBON:

11:27:59 20 Q. In your \$134,000 figure of planting, and then you
11:28:04 21 came up with \$301,000 worth of damage, is the difference
11:28:10 22 between those numbers the fact that the damage occurs to
11:28:14 23 several lots, and the fact that even the replanting of
11:28:19 24 the \$134,000 is only going to bring six feet, it's not
11:28:25 25 going to bring back what was originally there?

11:28:28 1 A. That's correct. It's going to start out with
11:28:32 2 six feet, and it's going to take a number of years to
11:28:35 3 grow on up.

11:28:35 4 MR. ROBON: Nothing further.

11:28:36 5 THE COURT: Thank you.

11:28:38 6 MR. BAHRET: Nothing.

11:28:40 7 THE COURT: You may step down. Thank you
11:28:41 8 very much.

11:28:44 9 MR. ROBON: The next witness, Your Honor?

11:28:45 10 THE COURT: Yes, please.

11:29:11 11 (The witness was sworn by the clerk.)

11:29:31 12 - - -

11:29:31 13 ROBERT KEESEY, DIRECT EXAMINATION

11:29:32 14 BY MR. ROBON:

11:29:32 15 Q. Mr. Keeseey, would you introduce yourself to the
11:29:35 16 jury, tell the jury where you're from, where you grew
11:29:38 17 up, a little bit about you?

11:29:40 18 A. Yes. My name is Robert Keeseey. I grew up in
11:29:44 19 the west end of Toledo around the Ottawa Park area.
11:29:50 20 And I went to Old Orchard grade school and DeVilbiss
11:29:56 21 high school. Then I continued my education down at
11:29:59 22 Indiana University where I was a business major in the
11:30:02 23 real estate department. I subsequently was gone from
11:30:08 24 Toledo in excess of 20 years and came back in 1999 to
11:30:13 25 continue my appraisal career, which is now in its 29th

11:30:17 1 year.

11:30:20 2 Q. And can you indicate to the jury the type of
11:30:27 3 appraisal work that you do?

11:30:29 4 A. Well, I like to say I've appraised virtually
11:30:33 5 everything but a nuclear storage waste facility. So
11:30:37 6 it's primarily commercial, although I do get involved in
11:30:40 7 condemnation-type cases where there's residential
11:30:45 8 property involved for highway widenings, and in this
11:30:49 9 case the Cambridge subdivision. But primarily
11:30:53 10 industrial, retail, apartments, other freestanding
11:30:59 11 retail types of properties, and large vacant land and
11:31:05 12 mixed-use development.

11:31:06 13 Q. And subdivisions?

11:31:07 14 A. Quite a few subdivisions, yes.

11:31:09 15 Q. Would you tell the jury what designation you have
11:31:13 16 as an appraiser, and what's the meaning of it?

11:31:15 17 A. I'm an MAI, Member Appraisal Institute. It's a
11:31:23 18 large organization of appraisers in the country. It
11:31:28 19 would be kind of equivalent to a CPA in accounting.

11:31:32 20 Q. How many MAI appraisers are in the Toledo area
11:31:36 21 that you're aware of?

11:31:38 22 A. I believe there's ten practicing MAIs at this
11:31:41 23 time.

11:31:42 24 Q. How many total appraisers in the Toledo
11:31:46 25 metropolitan area or northwest Ohio?

11:31:50 1 A. 500 to 1,000 probably. Mostly residential, I
11:31:55 2 would guess.

11:31:55 3 Q. And only ten of them have the designation?
11:31:58 4 You're one of the ten?

11:32:00 5 A. Yes. Correct.

11:32:01 6 Q. And would you indicate to the jury the percentage
11:32:10 7 of times that you testified for the government versus
11:32:15 8 testifying for private property owners?

11:32:19 9 A. I'd say it's probably 75 for government-related
11:32:25 10 entities.

11:32:25 11 Q. 75 percent?

11:32:27 12 A. 75 percent. 25 percent for individual property
11:32:31 13 owners.

11:32:33 14 Q. And would you indicate to the jury where you're
11:32:36 15 employed.

11:32:39 16 A. I'm currently employed by C.B. Richard Ellis
11:32:42 17 valuation part of their whole conglomerate

11:32:48 18 Q. Covers Toledo?

11:32:49 19 A. We cover -- I'm actually working out of
11:32:53 20 Southfield, Michigan. My home is in Oregon, but --

11:32:57 21 Q. Oregon, Ohio?

11:32:58 22 A. -- I work as much in Ohio as I do southeast
11:33:01 23 Michigan.

11:33:04 24 Q. You have to drive through Toledo every day?

11:33:08 25 A. Yes, but I'm going to be working part-time out of

11:33:10 1 Toledo also.

11:33:14 2 Q. Can you indicate to the jury -- nd you've
11:33:18 3 testified many times in the past, correct?

11:33:20 4 A. Yes.

11:33:21 5 Q. Both for the government and property owners?

11:33:23 6 A. That's correct.

11:33:24 7 Q. Can you indicate to the jury, what does an
11:33:30 8 appraiser do? What elements constitute determining of
11:33:36 9 value?

11:33:37 10 A. Well, in the -- let's just use a retail strip
11:33:44 11 center. We take a look at three different types of
11:33:47 12 appraisal techniques that we have, and that would be the
11:33:51 13 cost approach, the income approach, and the sales
11:33:54 14 comparison approach. Not all three are always
11:33:57 15 applicable. When we do subdivisions, we look at sales
11:34:02 16 of other lots, absorption, and we typically look at
11:34:09 17 under, like, land sales, and we use generally the income
11:34:13 18 approach. But if it's a brand new subdivision, we also
11:34:17 19 use the cost approach to estimate costs of putting in
11:34:21 20 roads, water, sewer, infrastructure, et cetera.

11:34:25 21 Q. You did an appraisal on the Cambridge
11:34:31 22 subdivision, correct?

11:34:32 23 A. I did.

11:34:33 24 Q. And can you tell the jury what information you
11:34:37 25 were given so you could do an appraisal of the lots?

11:34:42 1 A. Well, the subdivision plat, which shows the
11:34:46 2 individual lots themselves, what's on the internet,
11:34:52 3 which is the assessment of each, and a plat of each
11:34:57 4 site. And I was also given a survey; I believe Peterman
11:35:03 5 was the name, and it showed in a highlighted shaded area
11:35:09 6 the area affected by the taking of trees, brambles,
11:35:16 7 underbrush, et cetera.

11:35:17 8 Q. I'm going to hand you what we've marked as
11:35:20 9 Exhibit 7. Is this a copy of the appraisal -- I'm
11:35:25 10 sorry, the survey?

11:35:26 11 A. That's actually in the addendum of my report.
11:35:30 12 That's correct.

11:35:32 13 Q. And you looked at the encroachments on the lots
11:35:36 14 12, 13, 14, and 15, four lots. When I say encroachment
11:35:44 15 I'm talking about the --

11:35:46 16 A. Yes, those four lots.

11:35:47 17 Q. Go ahead. I didn't mean to interrupt you.

11:35:51 18 A. I think that was --

11:35:53 19 Q. That answered the question?

11:35:54 20 A. That answered the question.

11:35:58 21 Q. Would you explain to the jury what your
11:36:14 22 assignment was?

11:36:17 23 A. My assignment was to look at the lots as they
11:36:21 24 existed prior to the taking of the affected area. I
11:36:28 25 commonly refer to it as the denuded area, but it was the

11:36:33 1 trees that were taken, the underbrush, what's commonly
11:36:37 2 referred to as brambles, which is just a generic term to
11:36:41 3 indicate undergrowth. And then to look and see if there
11:36:46 4 may be any impact on the value of the individual lots
11:36:52 5 after the -- I'm going to call it an area that separates
11:37:06 6 the railroad tracks from the lots and the view, so that
11:37:12 7 the view of the railroad tracks is unobstructed from
11:37:19 8 what it might have been before. And then to measure
11:37:23 9 those damages of the lots before and after the taking of
11:37:29 10 the underbrush and trees.

11:37:35 11 Q. Can you --

11:37:37 12 MR. BAHRET: Your Honor, just --

11:37:38 13 Q. Come over here and take a look at this
11:37:40 14 subdivision plat.

11:37:42 15 MR. BAHRET: Excuse me, Marv. For purposes
11:37:45 16 of the record, he keeps using the word "taking," which
11:37:48 17 is a legal word. I object to that. I don't know if
11:37:50 18 he's trying to say it in the legal connotation.

11:37:52 19 THE COURT: I didn't interpret it, and the
11:37:54 20 jury will be instructed that he's using it in the sense
11:37:57 21 of removing.

11:38:01 22 MR. BAHRET: Thank you.

11:38:04 23 BY MR. ROBON:

11:38:04 24 Q. Mr. Keeseey, could you come out and indicate to
11:38:08 25 the jury which lots you felt were impacted. You can

11:38:12 1 bring your report if you'd like. Or here's the
11:38:15 2 original, Exhibit 114.

11:38:23 3 A. I'm going to turn to the actual plat here. It's
11:38:25 4 in the report.

11:38:31 5 These are the remaining lots.

11:38:34 6 Q. If you could stand so that all the jurors can
11:38:39 7 see.

11:38:41 8 A. These are the lots in the entire subdivision,
11:38:46 9 some of which have already been built on. So I'm not
11:38:53 10 really looking at these lots here because they're not,
11:38:58 11 A, they don't front along the railroad tracks. Some of
11:39:01 12 these have already been sold and built on. The
11:39:05 13 affected area with this lot 15, 14, 13, and 12 actually
11:39:14 14 is the area where these were removed. And then these
11:39:21 15 here have a view through this way also of the railroad
11:39:26 16 tracks.

11:39:28 17 MR. BAHRET: Could you use a number since
11:39:31 18 I've over here?

11:39:33 19 THE WITNESS: Lots 9, 10, and 11 also are
11:39:36 20 opened up more to the railroad tracks than they were
11:39:43 21 before. And then the lots that haven't sold and have
11:39:47 22 not been developed on this side of the road also now
11:39:53 23 have an unobstructed view of the railroad tracks.

11:39:57 24 Q. So did you use certain lots? Can you tell the
11:40:02 25 jury which lot numbers and point it out, which lot

11:40:05 1 numbers that you used that say there was a comparative
11:40:11 2 valuation?

11:40:13 3 A. Yes. There is in the letter of transmittal, as
11:40:17 4 well as other portions of the appraisal, but lots 6,
11:40:25 5 lots 8, obviously 7 has already been developed, and lots
11:40:32 6 9 through 15. A total of nine lots.

11:40:39 7 Q. So those are the only lots you say are affected?
11:40:44 8 You're saying lots 1 through 4 or 22 -- 16 and 22 are
11:40:51 9 not involved?

11:40:51 10 A. Well, they're not affected by the removal of
11:40:57 11 trees.

11:40:58 12 Q. And can you tell the jury what value collectively
11:41:02 13 that you placed on lots 6, 8, and then 9 through 15 as a
11:41:13 14 total based upon a reasonable degree of appraisal
11:41:17 15 certainty prior to any destruction of the vegetation on
11:41:22 16 the property of the Cambridge subdivision?

11:41:25 17 A. \$955,000 for these nine lots.

11:41:28 18 Q. That's what they would sell for?

11:41:30 19 A. Correct.

11:41:31 20 Q. And I think you put \$100,000 for each one except
11:41:35 21 lot 6 you had 100-and-a-quarter. Lot 8 you had
11:41:40 22 130,000?

11:41:40 23 A. That is correct.

11:41:41 24 Q. That would be the two lots on the other side of
11:41:44 25 the street?

11:41:44 1 A. Right. That's correct.

11:41:46 2 Q. And --

11:41:47 3 MR. BAHRET: Does he need to stand there or
11:41:49 4 can he resume over here?

11:41:50 5 MR. ROBON: I was trying to have him point
11:41:52 6 out which lots he was looking at here.

11:41:58 7 BY MR. ROBON:

11:41:59 8 Q. Were you then asked to do an appraisal as of
11:42:02 9 April and May, 2006, after the vegetation was cut, what
11:42:08 10 the lots are worth even today?

11:42:12 11 A. Yes.

11:42:13 12 Q. Based upon a reasonable degree of certainty, can
11:42:16 13 you indicate to the jury what is the value of these same
11:42:20 14 nine lots: 6, 8 and 9 through 15?

11:42:25 15 A. \$620,000.

11:42:29 16 Q. Is a difference of how much?

11:42:31 17 A. \$335,000.

11:42:37 18 Q. And in your appraisal, can you explain what is in
11:42:44 19 this big part of your appraisal to the jury? Are you
11:42:48 20 using comparables? Do you want to show them what they
11:42:52 21 are?

11:42:52 22 A. Yes.

11:42:53 23 Q. In other words, tell the jury how you came up
11:42:55 24 with those numbers.

11:42:59 25 A. We look at other comparable subdivisions,

11:43:02 1 hopefully in the same jurisdiction. This is Perrysburg
11:43:05 2 Township and Rossford school district. So what I tried
11:43:09 3 to do is keep -- confine my primary research to other
11:43:14 4 subdivisions, not necessarily, as I would call this, a
11:43:18 5 relatively high-end subdivision because of the price of
11:43:21 6 the homes and lots within this, and River Road address,
11:43:26 7 and so forth. But confining it to Perrysburg Township,
11:43:31 8 Rossford schools, and I found two other subdivisions,
11:43:36 9 Creekside and Belmont Meadows that met that criteria as
11:43:40 10 far as lot pricing and so forth. Although again, these
11:43:46 11 were higher price lots, as was exhibited by the sales
11:43:50 12 that they'd already achieved within the subdivision
11:43:53 13 itself.

11:43:55 14 And then we took a look at the size of the lots,
11:44:01 15 their orientation. And what I -- one of the reasons we
11:44:05 16 selected those subdivisions is both of them have lots
11:44:08 17 that run along the railroad tracks.

11:44:10 18 Q. You mean as comparables?

11:44:12 19 A. As comparables. So you have a matched pair
11:44:15 20 situation where you can look at the ones that have sold
11:44:19 21 on -- with what I would call a railroad track influence,
11:44:24 22 whether they're on the railroad tracks and have a view
11:44:27 23 or they front against the railroad tracks and the view
11:44:30 24 is blocked by vegetation. And then we would look at
11:44:36 25 sales within that same subdivision that would be like

11:44:39 1 these lots here across the street that might not have
11:44:43 2 either a view of the railroad tracks or obviously not
11:44:46 3 fronting on the railroad tracks, and make a meaningful
11:44:50 4 comparison between the two.

11:44:52 5 So I was able to do that in both Creekside
11:44:54 6 subdivision as well as Belmont Meadows, two that I
11:44:58 7 selected as being the most comparable. And again, the
11:45:01 8 three criteria: let's try to stay within the same
11:45:05 9 school district, and jurisdiction; let's try to have a
11:45:09 10 subdivision that is impacted by a railroad track
11:45:14 11 influence and non-influence. So the school system, the
11:45:19 12 jurisdiction, and the actual railroad track influence.

11:45:26 13 Q. And there's a home on lot 15. You just
11:45:30 14 appraised the lot itself, not the home?

11:45:32 15 A. That is correct.

11:45:32 16 Q. So you treated it as a vacant lot?

11:45:34 17 A. I did. Yes.

11:45:36 18 Q. You can take your seat.

11:45:56 19 MR. ROBON: Judge, some day I think I'll
11:45:59 20 make an invention, push a button and have it come up out
11:46:03 21 of the ground.

11:46:05 22 THE COURT: I think it's already been
11:46:06 23 invented.

11:46:09 24 BY MR. ROBON:

11:46:09 25 Q. Have you taken into account, Mr. Keesey, the fact

11:46:13 1 that we're -- everybody talks about a depressed real
11:46:18 2 estate market.

11:46:18 3 A. Absolutely.

11:46:19 4 Q. And can you explain to the jury why you take that
11:46:22 5 into account?

11:46:23 6 A. Well, no market, real estate or otherwise,
11:46:28 7 operates in a vacuum. It all has to do with market
11:46:32 8 conditions. And obviously in the late '90s to, say,
11:46:38 9 about the time of this -- or just after this subdivision
11:46:47 10 was impacted by the removal of the vegetation, the
11:46:52 11 market conditions were pretty strong in northwest Ohio
11:46:55 12 and most of the rest of the country. Recently, of
11:46:59 13 course, we've had what's commonly referred to in the
11:47:03 14 press as the subprime mortgage market, meaning people
11:47:09 15 that were on the edge of qualifying for a loan or their
11:47:12 16 credit is not quite as good, and that collapse has
11:47:16 17 impacted many markets, some worse than others.
11:47:21 18 Northwest Ohio never really goes up very fast, nor does
11:47:26 19 it go down very fast like you might have in areas of
11:47:30 20 Florida, which I call boom/bust markets, but --

11:47:33 21 Q. Up and down real quick?

11:47:35 22 A. Well, you know, that was a speculative market
11:47:38 23 where people were buying a home and flipping it and
11:47:40 24 making money. And many markets across this country --
11:47:44 25 I use Florida as an example because it tends to make the

11:47:47 1 news more often and it's really taken a hit recently,
11:47:50 2 but Toledo's been impacted, too. Not the least of
11:47:53 3 which is the underlying economic conditions of northwest
11:48:00 4 Ohio, southeast Michigan, which is heavily tied into the
11:48:03 5 automotive industry. And that also has had a dampening
11:48:09 6 impact on the overall value of real estate in general,
11:48:13 7 including single-family residential lots.

11:48:16 8 Q. And based upon a reasonable degree of appraisal
11:48:22 9 certainty, you believe that the effect of cutting the
11:48:28 10 five or six feet on these four lots, 12 through 15 on
11:48:33 11 the Cambridge Subdivision, caused a diminution in value?

11:48:36 12 A. Yes.

11:48:36 13 Q. And it was how much?

11:48:38 14 A. \$335,000.

11:48:42 15 Q. Have you had an opportunity -- did you get the
11:48:46 16 appraisal that the City had done by Mr. Domini?

11:48:49 17 A. Yes, I was -- I looked at Mr. Domini's appraisal.

11:48:54 18 Q. And can you tell the jury in your appraisal you
11:48:58 19 had values, I think, on seven lots of \$100,000 and one
11:49:02 20 of \$125,000 and one at \$130,000?

11:49:06 21 A. Before.

11:49:06 22 Q. Can you tell the jury the dollar figures that you
11:49:10 23 had after the vegetation was cut? Just give them the
11:49:18 24 numbers, if you would, from your appraisal.

11:49:20 25 A. Lots 12 through 15 fronting along the railroad

11:49:23 1 tracks, I had \$50,000. Lots 10 and 11, which are on
11:49:28 2 that same side of the street but -- 9, 10, and 11 on the
11:49:35 3 same side of the street but didn't have the vegetation
11:49:38 4 cut but could view the railroad tracks, I had at
11:49:42 5 \$70,000. And lots 6 and 8, which are across the
11:49:46 6 street, I had at \$105,000.

11:49:48 7 Q. And that totalled \$655,000, I believe?

11:49:51 8 A. \$620,000.

11:49:52 9 Q. \$620,000. If you divide nine by -- into
11:49:59 10 \$620,000, what's the average price per lot?

11:50:03 11 A. We're depending heavily on calculators. I'd say
11:50:08 12 it's close to \$75,000.

11:50:10 13 Q. Nine into six -- around \$68,000 to \$70,000?

11:50:16 14 A. That would be reasonable.

11:50:18 15 Q. When you looked at Mr. Domini's appraisal, what
11:50:21 16 aftermarket price -- I don't want to say aftermarket.
11:50:24 17 What price after the cutting did he give to the lots in
11:50:30 18 the subdivision?

11:50:31 19 A. If I might refer to it.

11:50:33 20 Q. Yes, take a look at it.

11:50:59 21 A. On an individual lot basis or on a --

11:51:02 22 Q. Just on an individual lot, the average?

11:51:05 23 A. Just under \$60,000.

11:51:07 24 Q. So you're around \$70,000; he's around \$60,000 per
11:51:10 25 lot?

11:51:11 1 A. That's reasonable, yeah.

11:51:13 2 Q. But what value did he have on the lots prior to
11:51:16 3 the cutting of the vegetation?

11:51:19 4 A. \$60,000.

11:51:21 5 Q. He didn't change his price?

11:51:23 6 A. Well, it went down a little bit.

11:51:26 7 Q. \$20,000?

11:51:28 8 A. \$20,000 overall for the lots that he appraised.
11:51:31 9 He actually, I see, appraised more lots than I did.

11:51:35 10 Q. But he only found a \$20,000 discrepancy by
11:51:38 11 cutting of all the shrubbery and the trees, correct?

11:51:41 12 A. That's what's indicated in the report.

11:51:43 13 Q. And can you tell the jury the methodology that
11:51:48 14 Mr. Domini used in coming up with his numbers as
11:51:52 15 compared to the methodology you used coming up with your
11:51:56 16 numbers for the first overall value before any trees
11:51:59 17 were cut?

11:52:00 18 A. Right. He used similar comparable sales in terms
11:52:07 19 of lot -- residential subdivisions in and around the
11:52:13 20 area, two of which were the same ones I did, Creekside
11:52:16 21 and Belmont Meadows. And he did a traditional
11:52:21 22 subdivision analysis where he valued the individual
11:52:25 23 retail value of the lots like I did, and then had an
11:52:31 24 absorption period of, I believe, six years to sell them
11:52:35 25 at that price, at \$60,000, discounted back to present

11:52:41 1 value based on some return on investment, which I
11:52:47 2 believe was at 20 percent per year, to come up with the
11:52:50 3 actual -- what we call the post-sale value of the
11:52:55 4 subdivision to a single purchaser.

11:52:58 5 Q. So the difference between your two appraisals and
11:53:02 6 the numbers are based on he's looking at selling the
11:53:07 7 whole subdivision to one buyer; you're looking to sell
11:53:10 8 it to a number of buyers?

11:53:12 9 A. Well, my appraisal was based on the individual
11:53:17 10 lot prices, what we call retail value. Retail value,
11:53:21 11 the individual lot prices.

11:53:22 12 Q. What somebody would pay for them?

11:53:25 13 A. Like an individual builder or some -- an
11:53:28 14 individual, yes.

11:53:29 15 Q. And what is the phrase that the appraisal
11:53:32 16 industry uses about buyers and sellers?

11:53:36 17 A. I'm sorry?

11:53:37 18 Q. What is the phrase that they use when they talk
11:53:40 19 about buyers and sellers?

11:53:42 20 A. You mean like grantors and grantees.

11:53:45 21 Q. No. No. No. The phrase that about
11:53:50 22 willingness, when you find a buyer?

11:53:51 23 A. A willing buyer, willing seller. We call it
11:53:54 24 market value, basically. And it's five or six criteria
11:53:58 25 using funds, U.S. dollars, willing buyer, willing

11:54:03 1 seller, each acting in their own self-interest, et
11:54:18 2 cetera.

11:54:18 3 Q. And the appraisal report, Exhibit 114, contains
11:54:21 4 all the backup data that you looked at in coming to your
11:54:23 5 conclusions?

11:54:25 6 A. Yes, it does.

11:54:27 7 Q. And the three -- I think you said 335?

11:54:36 8 A. Yes.

11:54:37 9 Q. That is a reasonable figure in your opinion on
11:54:40 10 the devaluation?

11:54:41 11 A. Yes, it is.

11:54:43 12 MR. ROBON: No further questions.

11:54:44 13 THE COURT: Thank you. You may cross.

11:54:47 14 MR. BAHRET: Thank you.

11:54:47 15 - - -

11:54:47 16 ROBERT KEESEY, CROSS-EXAMINATION

11:54:48 17 BY MR. BAHRET:

11:54:48 18 Q. Good morning, Mr. Keeseey.

11:55:00 19 A. Good morning.

11:55:00 20 Q. I don't think you and I have ever met before, at
11:55:04 21 least I don't think so. My name is Bob Bahret; I'm an
11:55:07 22 attorney representing the City of Toledo. Now, the
11:55:12 23 first thing you started talking about when you sat down
11:55:14 24 was that you have this certification, MAI?

11:55:21 25 A. That's correct.

11:55:22 1 Q. Mr. Domini does as well?

11:55:23 2 A. He certainly does.

11:55:24 3 Q. You're certainly not any better or greater
11:55:28 4 qualified than him, are you?

11:55:30 5 A. I don't -- the designation is equivalent. As
11:55:34 6 far as experience and so forth, I'm not familiar enough
11:55:38 7 with Mr. Domini to answer that question.

11:55:41 8 Q. Is he reputable in the area?

11:55:43 9 A. I would say yes, he is.

11:55:45 10 Q. In fact, he's done work for Mr. Robon?

11:55:48 11 A. I believe he has.

11:55:51 12 Q. All right. With that being said, I'm a bit
11:55:56 13 curious on some of the assumptions you're making in your
11:56:00 14 report. First of all, lots 9, 10, and 11, are you
11:56:06 15 aware of the fact that nobody is claiming there was any
11:56:09 16 encroachment or any trees or vegetation --

11:56:13 17 A. Yes.

11:56:13 18 Q. But yet you have still come up with a lowered
11:56:16 19 value for those lots because they can now see a train?

11:56:19 20 A. Yes.

11:56:20 21 Q. The same train they would see anyway once
11:56:24 22 somebody removes trees that are not on those lots?

11:56:29 23 A. I'm sorry.

11:56:32 24 Q. Let me ask it a different way.

11:56:35 25 A. Thank you.

11:56:35 1 Q. If at any time I ask something and you didn't
11:56:38 2 follow me, clue me in.

11:56:42 3 If I built a house on lots 9, 10, and 11, and I'm
11:56:45 4 out in the backyard having a barbecue, even if nobody
11:56:51 5 cut down any trees on lots 12, 13, 14, 15, I'm still
11:56:56 6 going to see and hear a train?

11:56:57 7 A. You know, I --

11:57:00 8 Q. Can you start with a yes or no?

11:57:03 9 If I'm on lot 9, 10, or 11 barbecuing in my back
11:57:09 10 yard, I'm sitting there next to barbie, nobody cut down
11:57:12 11 anything on lots 12, 13, 14, 15, am I still going to see
11:57:18 12 a train at my barbecue or not?

11:57:21 13 A. I don't know.

11:57:23 14 Q. Well, you do know that there are no trees behind
11:57:26 15 lots 9, 10, and 11, correct?

11:57:31 16 A. No, that's not correct. I have photographs, in
11:57:35 17 fact, in the report that would indicate there's a lot of
11:57:38 18 under brush and trees -- maybe not trees, per se, but
11:57:42 19 quite a bit of underbrush.

11:57:44 20 Q. Underbrush?

11:57:46 21 A. Well, I call it underbrush.

11:57:47 22 Q. I didn't see any trees there, but you say you
11:57:51 23 did?

11:57:52 24 A. I don't believe -- I can't recall. I do have
11:57:54 25 pictures of each one of those lots and how they front

11:57:58 1 along the railroad tracks.

11:57:59 2 Q. In any event, those lots are clear except for
11:58:03 3 some knee-high or waist-high scrub, correct?

11:58:09 4 A. I'm not sure the exact height of it. I did see
11:58:14 5 it during the summertime, so it was at least
11:58:18 6 shoulder-high in some cases, depending on what part of
11:58:21 7 the lot. There was significant underbrush, I would
11:58:25 8 say.

11:58:25 9 Q. And obviously if one builds a house there and has
11:58:27 10 a yard, one needs to get rid of that junk?

11:58:30 11 A. I wouldn't refer it to as junk, but you would
11:58:33 12 have to clear a portion of the lot to put the house on,
11:58:36 13 yes.

11:58:36 14 Q. And did you actually go stand on those lots and
11:58:40 15 see if you can see the tracks?

11:58:41 16 A. I did.

11:58:41 17 Q. Very easy to see the track, correct?

11:58:44 18 A. I did not see them before. I only saw it after
11:58:49 19 the vegetation was removed.

11:58:51 20 Q. And, of course I meant -- I didn't think you saw
11:58:55 21 it before. I asked you if you went there now, anytime
11:58:59 22 in 2006 or 2007, and determined it's very easy to see
11:59:03 23 the train?

11:59:03 24 A. Yes.

11:59:04 25 Q. So doesn't that answer my question, sir, as far

11:59:06 1 as if I'm sitting in my backyard on lots 9, 10, or 11,
11:59:10 2 flipping the burgers, I'm going to see the train going
11:59:14 3 behind my house, even if nothing happened on lots 12,
11:59:18 4 13, 14, or 15?

11:59:19 5 A. I'll answer it the same way: Not necessarily.

11:59:26 6 Q. Sir, at some point logic has to take over. You
11:59:29 7 can see the train now with no problem standing on lot 9,
11:59:35 8 10, or 11 looking straight in the direction of the
11:59:38 9 train?

11:59:38 10 A. Yes.

11:59:40 11 Q. Is there some reason you wouldn't be able to see
11:59:43 12 that train if you had the barbecue going?

11:59:47 13 A. I'm sorry. I'm confused. I believe the first
11:59:50 14 part of your question, which was two ago, we were
11:59:54 15 talking about we didn't -- we didn't distinguish between
11:59:59 16 before with the trees and other vegetation on those four
12:00:05 17 lots, and after, what you can see now. If you're
12:00:10 18 asking me after, what you can see now, I would say you
12:00:13 19 probably can see the train and certainly hear the train.

12:00:30 20 (Discussion had off the record.)

12:00:39 21 BY MR. BAHRET:

12:00:39 22 Q. If I'm standing here, here, or here, or sitting
12:00:43 23 next to the barbecue, that's for the record, 9, 10, or
12:00:48 24 11, the area that supposedly was encroached is down
12:00:53 25 here. You understand that?

12:00:54 1 A. On 12 through 15.

12:00:56 2 Q. All right. So let's assume nothing got cut
12:00:59 3 there.

12:00:59 4 A. Okay.

12:01:00 5 Q. Those trees, they're still there.

12:01:02 6 A. Okay.

12:01:03 7 Q. Assumption.

12:01:04 8 A. Okay.

12:01:05 9 Q. If I'm standing here, here, or here, 9, 10, and
12:01:09 10 11 again is, looking in this direction right now, I'm
12:01:12 11 going to see a train?

12:01:14 12 A. And again, it depends on what time of the year.
12:01:18 13 This time of year and these brambles -- the underbrush
12:01:22 14 is as tall as you are. You might not be able to see it.

12:01:25 15 Q. The train tracks are substantially higher than
12:01:28 16 those yards; are they not?

12:01:29 17 A. I would say eight -- six to eight feet higher.
12:01:38 18 Substantially might --

12:01:39 19 Q. And the train itself is substantial height?

12:01:46 20 A. It's higher than the difference between the back
12:01:48 21 of those lots and the train tracks, yes.

12:01:51 22 Q. So let me try it again. Are you actually
12:01:54 23 telling me that the brambles themselves would be so tall
12:01:57 24 that I couldn't see a train that's at least 30 feet
12:02:01 25 higher than my ground?

12:02:04 1 A. If I might, 9, 10 and 11 tend to be a little
12:02:10 2 lower, okay.

12:02:11 3 Q. That's why they brought all that fill dirt in
12:02:15 4 down there.

12:02:15 5 A. They're lower than 12 through 15, at least in the
12:02:18 6 backyard. So they're somewhat depressed. I did see
12:02:22 7 it in the summer, and I know there was a substantial
12:02:24 8 amount of undergrowth there. And my pictures would
12:02:27 9 indicate that. They are in the appraisals.

12:02:29 10 Q. Even at that time of year you could see the
12:02:32 11 tracks?

12:02:32 12 A. Well, again --

12:02:34 13 Q. Can you start with a yes?

12:02:36 14 A. Not necessarily.

12:02:37 15 Q. You couldn't necessarily see the tracks when you
12:02:40 16 were there in the summer?

12:02:42 17 A. Depends where they placed the orientation of the
12:02:44 18 house, where the barbecue is, if it's on an elevated
12:02:49 19 deck or the backyard.

12:02:50 20 Q. Could you see the train when you were there?

12:02:52 21 A. You could -- could I see the train when I was
12:02:55 22 there?

12:02:55 23 Q. Yes.

12:02:56 24 A. I was able to see the train -- not maybe the full
12:03:01 25 body of the train, but certainly the top of the train

12:03:03 1 when I was there.

12:03:04 2 Q. All right. And across the street on Jacqueline
12:03:10 3 is higher yet; is it not?

12:03:11 4 A. Yes, it is.

12:03:12 5 Q. The property in general slopes down towards the
12:03:15 6 tracks?

12:03:15 7 A. It does, yes.

12:03:16 8 Q. So somebody across the street -- let me get the
12:03:24 9 lot number. Say lot 7 or 8, these two that are down
12:03:31 10 closest to the cul de sac, those two lots would easily
12:03:36 11 be able to see a train in the area behind lots 9, 10 and
12:03:43 12 11?

12:03:43 13 A. I would say that's probably accurate.

12:03:46 14 Q. Now, when you figure your devaluation, you start
12:03:54 15 with the assumption that all the trees that are removed
12:03:58 16 should have stayed. Let me ask --

12:04:05 17 A. I'm starting with the assumption that all the
12:04:08 18 trees that were there would have stayed there.

12:04:14 19 Q. I think maybe we didn't communicate. I'll take
12:04:17 20 the blame for that one. You understand that the City
12:04:22 21 and its contractors had every right to take down every
12:04:25 22 tree on railroad property?

12:04:26 23 A. I believe that's correct.

12:04:28 24 Q. And even doing that, even though it's legal and
12:04:32 25 may have been, there will be testimony, totally

12:04:36 1 necessary, that, in and of itself, could still devalue a
12:04:39 2 lot for which no action is available?

12:04:41 3 A. You know, that -- yes. I would agree with that.

12:04:46 4 Q. Now, you made some assumptions in your report
12:04:50 5 here including, you say, that they were selling three
12:04:56 6 lots per year?

12:04:59 7 A. I believe it's 2.5 lots per year.

12:05:08 8 Q. What's it mean to call it an absorption of about
12:05:13 9 3 lots per year?

12:05:18 10 A. I think is -- because I just read the appraisal,
12:05:21 11 again, while I was in the room, and I believe somewhere
12:05:26 12 in here it says two and half lots per year.

12:05:29 13 Q. Go to page 22. What's it mean to say absorption
12:05:32 14 of three lots per year?

12:05:40 15 A. The most recent -- if I might read --

12:05:43 16 Q. Can you answer the question?

12:05:44 17 THE COURT: Just read it to yourself,
12:05:46 18 please.

12:05:46 19 A. About three lots per year. Two and a half is
12:05:49 20 about three lots per year.

12:05:51 21 Q. But the word -- the answer to my question:
12:05:53 22 What's absorption mean? That's lots that are moving,
12:05:56 23 sold?

12:05:56 24 A. Bought and sold, yes.

12:05:58 25 Q. And in your report I notice that you say the last

12:06:03 1 lot that sold was actually at the end of 2004?

12:06:10 2 A. December of '04.

12:06:11 3 Q. Now, what lot was that, sir?

12:06:22 4 A. I would have to say -- I'd say one speculative
12:06:26 5 home. 15 was a speculative home.

12:06:28 6 Q. You're right. It's their own spec house. So
12:06:30 7 they didn't sell it. They just built a house on it?

12:06:33 8 A. But we often call that an absorption, whether it
12:06:37 9 has a house on it and they sell the whole package or
12:06:39 10 just the lot.

12:06:40 11 Q. Well, we can call it anything we want, I guess,
12:06:42 12 but the fact of the matter is it didn't sell. Are you
12:06:46 13 with me?

12:06:47 14 A. Yes, I am.

12:06:47 15 Q. And you agree?

12:06:48 16 A. I agree.

12:06:49 17 Q. The last actual sale was in January of 2004,
12:06:55 18 correct?

12:06:58 19 A. I'm not absolutely certain on that.

12:07:00 20 Q. All right. If you want to check the records,
12:07:02 21 that's fine, but I'm telling you it was in January of
12:07:06 22 '04. And they sold it to somebody that was an existing
12:07:09 23 homeowner that just wanted an empty lot next door. Are
12:07:13 24 you aware of that?

12:07:14 25 A. I was unaware of that.

12:07:15 1 Q. Were you aware that they sold that lot for
12:07:19 2 \$90,000?

12:07:19 3 A. I was aware of that.

12:07:20 4 Q. So they sold it for about \$40,000 to -- \$45,000
12:07:25 5 less than its advertised price?

12:07:27 6 A. That, I was aware of.

12:07:28 7 Q. Now, the fact of the matter is, sir, your opinion
12:07:31 8 is that these lots were overpriced to begin with?

12:07:34 9 A. Some of these lots. So I stated that in the
12:07:38 10 appraisal, yes.

12:07:39 11 Q. And, in fact, all of them that abut the railroad
12:07:43 12 were tremendously overpriced?

12:07:46 13 A. They were overpriced.

12:07:47 14 Q. Significantly overpriced?

12:07:49 15 A. They were overpriced.

12:07:51 16 Q. Are we fencing over the word "significant"?

12:07:53 17 A. I can actually give you the dollar amount.

12:07:56 18 Q. Okay. What dollar amount?

12:07:58 19 A. Well, I believe they were listed for \$145,000.

12:08:03 20 Q. Okay.

12:08:04 21 A. In my value, \$100,000.

12:08:09 22 Q. So in your mind is a 50 percent overprice
12:08:13 23 significant?

12:08:14 24 A. Well, it's not quite 50 percent, but I would say
12:08:19 25 50 percent is significant. But that's a third now.

12:08:22 1 Q. What's that?

12:08:23 2 A. The difference between 100 and 150 is actually 33
12:08:28 3 percent.

12:08:29 4 Q. But the difference going the other way, sir.
12:08:32 5 It's 50 percent more than it should have been priced?

12:08:35 6 A. I understand.

12:08:36 7 Q. Are you with me on that one?

12:08:37 8 A. I understand.

12:08:38 9 Q. It's 50 percent too much?

12:08:41 10 A. \$45,000 versus \$145,000 is still not 50 percent.
12:08:48 11 We're arguing over mathematical semantics.

12:08:52 12 Q. 47 percent. I don't know the exact percentage,
12:08:56 13 but it's just under 50.

12:08:58 14 A. It's under 50.

12:08:59 15 Q. You point out in the comparables those lots were
12:09:02 16 having trouble selling when they abutted the railroad?

12:09:05 17 A. Yes, sir.

12:09:06 18 Q. That's because people just don't want to live
12:09:08 19 near the railroad?

12:09:10 20 A. Generally, my market -- my market information, I
12:09:16 21 would say yes.

12:09:17 22 Q. And those lots, your comparables, those were
12:09:22 23 selling for around \$40,000?

12:09:25 24 A. Different subdivision, different pricing
12:09:27 25 structure.

12:09:28 1 Q. But that's what they were selling for?

12:09:30 2 A. Correct. Some of them. There were \$50,000 --
12:09:33 3 some of them were \$50,000.

12:09:35 4 Q. All right. Getting back to the sales, why did
12:09:40 5 they have no activity in 2003 -- or excuse me, 2004? I
12:09:48 6 misspoke.

12:09:48 7 A. I can honestly say I don't know.

12:09:52 8 Q. Why did they not sell a single house in that
12:09:55 9 development or lot in 2005?

12:09:59 10 A. I don't know.

12:10:01 11 Q. Why did they not sell a single lot or house in
12:10:04 12 this development in the first four months of 2006?

12:10:09 13 A. Also, I don't know.

12:10:15 14 Q. That's certainly not absorbing two and a half to
12:10:18 15 three houses per year?

12:10:19 16 A. We took the absorption period over the time they
12:10:23 17 started selling until the time they stopped in December
12:10:25 18 of '04. As you say, January of '04.

12:10:30 19 Q. All right. Why would you stop when obviously
12:10:34 20 you have a proven track record, a proven history after
12:10:38 21 January of '04, and you know now my absorption rate is
12:10:44 22 zero. Why wouldn't you use that?

12:10:50 23 A. I may have used from the time they started until
12:10:54 24 April of '06.

12:10:58 25 Q. Why wouldn't we use the most recent data? You've

12:11:01 1 got two and a half to three years of data that's
12:11:05 2 reliable, accurate, and the answer is, nothing sold.

12:11:10 3 A. We do appraisals in a snapshot in time. In this
12:11:15 4 case it was April of '06, and we're dealing with that
12:11:21 5 timeframe or the date of taking. We commonly refer to
12:11:26 6 that --

12:11:30 7 MR. BAHRET: Again, Your Honor, could I have
12:11:31 8 a cautionary instruction on the -- his saying the "date
12:11:36 9 of taking"?

12:11:36 10 THE COURT: I've done it once. I'll say it
12:11:39 11 again and indicate that the use of that word, ladies and
12:11:42 12 gentlemen, is, in essence, a synonym or another way of
12:11:45 13 saying removing. We've been talking for a couple days
12:11:48 14 now about the removing of trees and vegetation and
12:11:52 15 bramble.

12:11:53 16 MR. BAHRET: Thank you.

12:11:55 17 BY MR. BAHRET:

12:11:55 18 Q. Sir, you mentioned that this subdivision, it's
12:12:01 19 intended to be upscale. Would you agree with me that
12:12:04 20 although one may intend an upscale subdivision, that
12:12:07 21 doesn't mean one gets what one tries to accomplish?

12:12:11 22 A. I'm sorry; would you restate that, please?

12:12:14 23 Q. You said that this subdivision was intended to be
12:12:16 24 a somewhat upscale --

12:12:18 25 A. Yes.

12:12:19 1 Q. Not all intentions come to fruition in the
12:12:25 2 development business?

12:12:26 3 A. Absolutely.

12:12:28 4 Q. In fact, I could have all the best intentions to
12:12:30 5 attract the wealthy to my development, and if I've got a
12:12:34 6 train going through my backyard, it may not work?

12:12:38 7 A. The market generally makes those determinations.

12:12:41 8 Q. And there's been talk about the mansions in the
12:12:45 9 area, the Ford mansion and all that. All of the
12:12:49 10 mansions on that road are on the other side of River
12:12:52 11 Road, correct?

12:12:54 12 A. I would say the larger homes are on -- I'm not
12:12:58 13 sure every mansion along River Road is on the river.

12:13:01 14 Q. Certainly the huge majority?

12:13:04 15 A. I would -- yes.

12:13:05 16 Q. And they've got frontage down to the river and
12:13:08 17 stuff?

12:13:08 18 A. In many cases.

12:13:10 19 Q. I mean, there are no mansions surrounding on the
12:13:13 20 same side of the street as Cambridge?

12:13:15 21 A. I didn't really see what I would call a mansion.

12:13:19 22 Q. And, in fact, most of the housing surrounding
12:13:22 23 Cambridge is actually pretty modest?

12:13:26 24 A. Some of the subdivisions are modest, and some are
12:13:30 25 better.

12:13:34 1 Q. I believe I heard you say that you do acknowledge
12:13:37 2 that the market really took a dive sometime right around
12:13:41 3 the spring, first part of summer of '06?

12:13:45 4 A. Actually, I'd say it was a little later than
12:13:48 5 that. I'm going to say probably late '06 to early '07
12:13:51 6 is when this subprime market really started to hit the
12:13:55 7 newsstands.

12:13:57 8 Q. And by the way, do you know that Old Granite
12:14:00 9 Development Company can't peddle lots in two other
12:14:05 10 developments?

12:14:06 11 A. I am aware of that, yes.

12:14:08 12 Q. They don't even have a railroad problem?

12:14:10 13 A. I am aware of that also.

12:14:16 14 Q. One last thing, and I'll sit down. You
12:14:19 15 mentioned Perrysburg Township, Rossford schools. In
12:14:23 16 the real estate world, Rossford schools is a bit of a
12:14:28 17 drawback; is it not?

12:14:29 18 A. If you're making a comparison to --

12:14:32 19 Q. That's what I intend to do.

12:14:34 20 A. You know, I don't know that Rossford's a bit of a
12:14:37 21 drawback, in and of itself.

12:14:41 22 Q. Did you say it is or isn't?

12:14:43 23 A. I'm going to answer that no.

12:14:45 24 Q. You don't believe it is?

12:14:46 25 A. No.

12:14:46 1 Q. So, I mean, I know you evaluate, you appraise,
12:14:51 2 but are you involved in marketing at all?

12:14:54 3 A. Only in inquiring about what the sales and
12:14:59 4 brokerage community is doing.

12:15:01 5 Q. You don't really know what people are saying to
12:15:03 6 the real estate agents; like, I prefer to be in
12:15:07 7 Perrysburg Township, Perrysburg schools?

12:15:10 8 A. Actually, I do. Those are the kind of questions
12:15:12 9 we ask.

12:15:13 10 Q. And you don't believe there's any -- I'm not
12:15:15 11 saying anything negative about Rossford schools, so
12:15:18 12 don't take this the wrong way, but some people have a
12:15:22 13 view that it's not quite equal with Perrysburg?

12:15:24 14 A. Now, I would agree with what you just said.

12:15:29 15 Q. It doesn't mean they're right. It just means
12:15:31 16 there's that view?

12:15:32 17 A. That is correct.

12:15:34 18 Q. Sir, when you wrote this report, you were with
12:15:36 19 William Fall group?

12:15:38 20 A. I was with the William Fall group.

12:15:40 21 Q. When did you leave there?

12:15:42 22 A. I left the first week of March of this year.

12:15:44 23 Q. Why?

12:15:45 24 A. A better job opportunity where I was heading up
12:15:50 25 the litigation support department of the largest real

12:15:53 1 estate firm in the world.

12:15:55 2 Q. C.B. --

12:15:56 3 A. C.B. Richard Ellis out of their Southfield
12:15:59 4 office.

12:16:00 5 Q. Aren't they -- Reichle Klein is also part of it?

12:16:05 6 A. Locally Michael Realty within the past year
12:16:08 7 merged with Reichle Klein, and they're an independent,
12:16:14 8 almost, kind of a franchise. They're under the
12:16:17 9 umbrella of -- it's just a different organization.

12:16:20 10 Q. That's not where you hang your hat?

12:16:22 11 A. No, but I'll probably be working out of there
12:16:27 12 shortly.

12:16:27 13 Q. So there is a connection?

12:16:29 14 A. Oh, yes, absolutely.

12:16:32 15 MR. BAHRET: Thank you, sir.

12:16:33 16 THE COURT: Any redirect?

12:16:34 17 MR. ROBON: Yes, Your Honor.

12:16:35 18 - - -

12:16:35 19 ROBERT KEESEY, REDIRECT EXAMINATION

12:16:36 20 BY MR. ROBON:

12:16:36 21 Q. I'm going to hand you Exhibit 115. Have you
12:16:48 22 seen documents like this before, Mr. Keeseey? They're
12:16:51 23 from the county auditor showing sales.

12:16:53 24 A. Yes, we go to the county websites often, and this
12:16:58 25 is one that I've been on hundreds of times.

12:17:01 1 Q. And on page 1, does it talk about Cambridge lot
12:17:13 2 four?

12:17:13 3 A. Cambridge lot four, yes.

12:17:15 4 Q. And I think on the top of this --

12:17:20 5 THE COURT: This is 115?

12:17:21 6 MR. ROBON: Yes.

12:17:29 7 BY MR. ROBON:

12:17:30 8 Q. On the second page over in the left-hand column,
12:17:35 9 it shows that Schoen Homes, which is a builder, sold a
12:17:44 10 home, obviously it was a new home, on January 12 of '05?

12:17:48 11 A. Yes.

12:17:49 12 Q. Did you not consider that a sale of a lot because
12:17:52 13 a home was existing on it, a new home?

12:17:56 14 A. If it was a new home, generally speaking, Schoen
12:18:02 15 Homes would have bought it from Old Granite, and that
12:18:07 16 was an absorbed lot then.

12:18:10 17 Q. Wouldn't that show when the ultimate retail
12:18:13 18 purchaser buys it?

12:18:14 19 A. No, generally when it's sold to the home builder
12:18:17 20 or homeowner.

12:18:19 21 Q. Okay. But there were transfers in 2005 of the
12:18:24 22 lots?

12:18:25 23 A. Of a --

12:18:26 24 Q. Lot four?

12:18:27 25 A. Of a lot with a home on it.

12:18:29 1 Q. Right. My next question is after your
12:18:31 2 questioning by Mr. Bahret, have you changed your opinion
12:18:36 3 at all as to the diminution in value?

12:18:40 4 A. No, I have not.

12:18:42 5 MR. ROBON: No further questions.

12:18:44 6 THE COURT: Anything else?

12:18:45 7 MR. BAHRET: No, thanks.

12:18:47 8 THE COURT: You may step down. Thank you.

12:18:48 9 Ladies and gentlemen, we're at the point for
12:18:50 10 our lunch recess. I understand some of you may be
12:18:54 11 taking a stroll. That's a good idea. I show a little
12:18:59 12 after 12:15. Let me give you a few extra minutes
12:19:03 13 because we may have some matters that we can take care
12:19:07 14 of off the record to keep the trial moving. So why
12:19:10 15 don't we plan to start back promptly at 1:30. That way
12:19:13 16 you won't be, hopefully, rushed and can enjoy a break.
12:19:18 17 Please remember the rules. We will reconvene at 12:30.
12:19:22 18 We're adjourned.

12:19:25 19 THE JUROR: 1:30?

12:19:26 20 THE COURT: I'm sorry, 1:30.

13:35:46 21 (Lunch recess taken.)

13:35:48 22 THE COURT: We're still with the plaintiff.
13:35:49 23 The plaintiff may call its next witness.

13:35:52 24 MR. ROBON: We call Jack Laskey to the
13:35:58 25 stand.

13:36:08 1 (The witness was sworn by the clerk.)

13:36:14 2 MR. ROBON: Jack, did you get your plugs?

13:36:18 3 THE WITNESS: Let me see if I can do it
13:36:20 4 without them.

13:36:23 5 - - -

13:36:23 6 JOHN LASKEY, DIRECT EXAMINATION

13:36:24 7 BY MR. ROBON:

13:36:24 8 Q. Do you want to introduce yourself to the jury and
13:36:33 9 tell the jury about your family, how many kids you have
13:36:36 10 and what you do?

13:36:37 11 A. I think I'm going to need them. I'm sorry,
13:36:41 12 folks. I'm hard of hearing. It's not loudness; it's
13:36:47 13 letters.

13:36:55 14 Q. Put them on. Introduce yours to the jury. Tell
13:37:04 15 the jury where you grew up, your family, and what you
13:37:10 16 do?

13:37:10 17 A. My name is John Laskey, but I go by Jack Laskey.
13:37:17 18 I am 72 years old. I grew up in west Toledo, same as
13:37:23 19 the fellow before me, around Ottawa Park. I went to
13:37:28 20 Gillmore High School. I went to Notre Dame for a
13:37:32 21 couple years. Came back and went to the University of
13:37:37 22 Toledo night school. Got married, had eight children.
13:37:43 23 Got divorced. Remarried another lady. My first job was
13:37:55 24 with A.P.; that is a finance division of RCA/Whirlpool.
13:38:24 25 Then I got an opportunity to go to Port Lawrence Title &

13:38:28 1 Trust Company. I've been in the title business for 47
13:38:32 2 years. I started out as a title examiner at the
13:38:38 3 courthouse for eight years, then became a salesman, and
13:38:43 4 my father and six other stockholders started Port
13:38:48 5 Lawrence in 1930. My dad and I started buying the
13:38:55 6 heirs, the heirs of the stockholders out. Then my dad
13:39:03 7 wanted to retire, so I bought him out. That was just
13:39:06 8 prior to the recession of 1979 and '80. And my father
13:39:13 9 was 72 years old, so I started to buy him out in the
13:39:18 10 late '70s. And then we went through a recession, and
13:39:23 11 that was a tough one, but not as tough as the one we're
13:39:28 12 in right now. And I said if I make it through this
13:39:31 13 one, I'm going to sell this and get out.

13:39:35 14 Q. Your current title company you're referring to?

13:39:38 15 A. Pardon me?

13:39:39 16 Q. What's your current title company?

13:39:41 17 A. Port Lawrence Title.

13:39:45 18 Q. When you said sell out, I misunderstood what you
13:39:48 19 were saying.

13:39:49 20 A. I'm sorry. I said we went through the
13:39:54 21 recession, and it was a tough recession, like we're in
13:39:58 22 now, and I said if I ever get through this one, I'm
13:40:03 23 going to sell the company.

13:40:04 24 Q. This one being the recession, okay?

13:40:07 25 A. Yeah, the recession. If -- there's been --

13:40:12 1 Q. Could you get a little closer? I'm having a hard
13:40:15 2 time hearing you.

13:40:16 3 A. Do you want me to eat this thing?

13:40:23 4 Anyways --

13:40:24 5 Q. Tell the jury when you left Port Lawrence and
13:40:27 6 when you started --

13:40:28 7 A. I sold Port Lawrence in 1988 to First American
13:40:32 8 Title. I then stayed on until 1999. When I sold Port
13:40:42 9 Lawrence in 1988, I thought they would throw me out like
13:40:47 10 so many big companies do, so I went in the land
13:40:54 11 development business in 1988. And I've developed about
13:41:00 12 ten to 12 residential developments, and one commercial.
13:41:07 13 The commercial is -- some might be familiar with; it's
13:41:12 14 called Briarfield Business Park, which is off 475 and
13:41:17 15 Dussel. It's 135 acres.

13:41:23 16 Q. That was your biggest development, correct?

13:41:25 17 A. Yes.

13:41:26 18 Q. And how many lots would you say that of all those
13:41:32 19 developments you have platted?

13:41:36 20 A. Six-, 700.

13:41:38 21 Q. Six- or 700?

13:41:40 22 A. (Witness nods.)

13:41:41 23 Q. Tell us how you first got involved with Tom
13:41:45 24 Taylor and the Cambridge property.

13:41:47 25 A. My wife became president of Port Lawrence Title

13:41:54 1 after I left. She called me and she -- Tom Taylor -- I
13:41:58 2 had left Port Lawrence in 1999, so this had to be around
13:42:02 3 2000. She called me and she said, I want you to meet
13:42:06 4 Tom Taylor. He's doing business with us at Port
13:42:09 5 Lawrence. He's a good, honest guy, hard-working, and
13:42:13 6 funny. She said, You'll like him.

13:42:16 7 So I met with him. And he had a development
13:42:22 8 called Marble Cliffs where he's originally from in
13:42:25 9 Columbus. He grew up in Marble Cliffs. He named a
13:42:29 10 subdivision on Brint Road that. He said, I need a
13:42:33 11 partner to go in with me on this piece on East River
13:42:38 12 Road. So we took a drive over there and walked the
13:42:42 13 land, and he had a preliminary plat.

13:42:48 14 Q. That's a preliminary drawing of the lots?

13:42:51 15 A. Preliminary drawing of all the lots the way it is
13:42:56 16 today. He had had several different renderings, but
13:43:01 17 that's the one that we liked the best. He told me
13:43:04 18 Peterman would do it. I was familiar with Peterman out
13:43:06 19 of Findlay. So I asked him the price. I drove up and
13:43:15 20 down -- I'm very familiar; I'm from Perrysburg. I
13:43:20 21 don't live in Perrysburg; I live out in Wood County out
13:43:25 22 by Waterville and by the Waterville bridge. And -- but
13:43:31 23 I was very familiar with Perrysburg. And I said, okay,
13:43:35 24 let's call Betty Lazzaro and get her opinion.

13:43:40 25 Q. Who is Betty Lazzaro?

13:43:43 1 A. Betty Lazzaro is probably one of the top
13:43:46 2 producers in the Toledo market for housing. She is an
13:43:52 3 expert on Perrysburg. She lives on the corner of
13:43:58 4 Morningside and East River Road, which is across from
13:44:04 5 Hospice, which is right down the road from us. Betty
13:44:07 6 was a customer of mine or ours at Port Lawrence, and I
13:44:13 7 knew her well. She's been in the business probably
13:44:15 8 about 25 years and very, very successful.

13:44:18 9 Q. What did she think of the subdivision?

13:44:20 10 A. She liked it. She liked it very well. So then
13:44:23 11 we said -- we started talking about marketing it. This
13:44:29 12 is before we ever platted. This is about February, I
13:44:34 13 would say, January, February, right after the first of
13:44:37 14 the year. But the property wasn't platted yet or
13:44:42 15 anything. And we were ready to plat, all ready to go.
13:44:48 16 We said, how do we want to market it? Okay. So we
13:44:54 17 said, Well, let's try to find the best builders we can
13:44:58 18 have and sell them the whole, you know, get them to buy
13:45:01 19 a few lots, try it out, and then sell. We settled --
13:45:06 20 between Betty, Tom, and I, and I know a lot from being
13:45:09 21 in the title business for 47 years, I knew most of the
13:45:13 22 builders.

13:45:14 23 Q. So you're talking about exclusive builders, only
13:45:17 24 allowing certain ones to build in the subdivision?

13:45:20 25 A. Yes.

13:45:20 1 Q. Who were those three builders?

13:45:22 2 A. Todd Berman, who is the premier builder of
13:45:28 3 Toledo. Right after him I would say Eric Huffman, who
13:45:33 4 is -- did a lot of building and remodeling in
13:45:37 5 Perrysburg. And then the next one was Bill Schoen.
13:45:40 6 Bill I knew from -- he went to Notre Dame. I knew
13:45:45 7 Bill. I did business with his parents, or his father.
13:45:48 8 Anyways, I called Bill. So quite -- it was really a
13:45:53 9 pretty good deal because we got all three of those guys
13:45:57 10 together with Betty and the three of us; we all met over
13:46:03 11 in about March.

13:46:06 12 Q. Of '01?

13:46:07 13 A. Of '01. I'm sorry. Yes. And we met over
13:46:11 14 there and said, Okay, what do you guys think? Well, we
13:46:14 15 went over and drove the property, and they liked it.
13:46:17 16 And they all agreed to take two lots. And --

13:46:24 17 Q. Each?

13:46:25 18 A. Each. Each. I'm sorry. Okay. Agreed to
13:46:31 19 take two lots.

13:46:33 20 We sat down, and we even figured out the pricing
13:46:36 21 of the lots. And those guys are all competitors in a
13:46:41 22 way; Todd Berman is far bigger. I mean, he had
13:46:45 23 operations -- he builds all of \$2-, \$3-, \$4-, \$5-,
13:46:50 24 \$6-million homes. And he was in not only Toledo but
13:46:55 25 Columbus and Petoskey, Michigan he had operations.

13:46:58 1 Q. Did the three builders have an input onto the
13:47:06 2 pricing of the lots, \$120,000 to \$150,000?

13:47:10 3 A. Yes. Okay.

13:47:11 4 Q. Tell us what happened after that.

13:47:14 5 A. After that, we platted the property on June 4th,
13:47:23 6 2001. After that they -- 9/11 happened, and they got
13:47:37 7 nervous. They were all busy doing contract houses;
13:47:44 8 they all had contracts going.

13:47:46 9 Q. Building houses?

13:47:47 10 A. Building houses.

13:47:48 11 Q. Signed contracts with other people?

13:47:50 12 A. Yes. Yes. They had contracts with other
13:47:53 13 people. And so -- but they did. They said, we've got
13:47:59 14 reservations about taking down two, but we'll take down
13:48:02 15 one now. So in October/November of 2001 they took
13:48:08 16 down --

13:48:09 17 Q. When you say take down, they purchased?

13:48:11 18 A. They purchased, yes.

13:48:13 19 Q. Slogan in the industry, take down?

13:48:17 20 A. Yes. They each took down a lot. And we did it
13:48:23 21 by draws, you know, one, two, three.

13:48:27 22 Q. Then they could decide which lots they wanted?

13:48:30 23 A. Yes. And they picked their lots out, and we
13:48:33 24 went forward from there.

13:48:34 25 Q. Then you sold three more lots to those, one each?

13:48:38 1 A. No.

13:48:38 2 Q. Tell us what happened then.

13:48:40 3 A. What happened then is -- well, nobody really
13:48:44 4 understands in 2002, if you go to the United States
13:48:53 5 Bureau of Statistics, you'll find out that southeast
13:48:59 6 Michigan, northwest Ohio, northeast Ohio, as far over to
13:49:03 7 Cleveland went into a recession. We all think of it as
13:49:07 8 a recession as the whole nation and everything. But
13:49:12 9 2002 we went into a recession. And you can check that
13:49:18 10 with the United States Bureau of Statistics. We didn't
13:49:23 11 know that at the time, of course, but we knew there
13:49:27 12 was -- nothing was -- nothing was perking. So I
13:49:37 13 then -- they didn't build anything in 2002. And the
13:49:42 14 worst thing you can do or second worst thing you do is
13:49:48 15 not get your subdivision going. And --

13:49:51 16 Q. When you say get it going, you mean getting
13:49:54 17 houses started?

13:49:55 18 A. Yes, getting houses started. By this time we're
13:49:58 19 platted, we've got the streets in, we've got the
13:50:01 20 declaration and restrictions are filed, which were
13:50:05 21 pretty stiff. But we had the top sales lady; we had the
13:50:11 22 top three builders. Oh, then Betty Lazzaro threw a
13:50:17 23 reception at Belmont Country Club. Belmont Country
13:50:22 24 Club was right across the railroad tracks from us. It
13:50:26 25 used to be a hunting preserve for W.W. Knight, then he

13:50:31 1 sold it to the members to build a golf course. And
13:50:37 2 they had about 250 members.

13:50:40 3 And the market that we were going through --
13:50:42 4 there's a saying that says demographics is destiny.
13:50:47 5 Well, our market, we thought the most money would be
13:50:50 6 with empty-nesters, wealthy empty-nesters. Down the
13:50:56 7 road from our -- from Cambridge is a place called the
13:51:01 8 Hamlet. The Hamlet was developed in 1976 by Bob
13:51:07 9 Cavalear who is the premier developer of Toledo in his
13:51:12 10 day. He's about 82 years old now, but he's still a
13:51:16 11 developer. Then our next place was Eagle Point Colony;
13:51:19 12 there's 76 homes in there. Then we had 250 members at
13:51:24 13 Belmont Country Club. Betty had threw a reception
13:51:32 14 there at Belmont, and we got a crowd of about 40 people.
13:51:36 15 And I didn't think that was too bad. Most of them were
13:51:41 16 older; I would say empty-nesters. And so we decided to
13:51:47 17 go with that idea. But nobody built anything.

13:51:50 18 And I happened to run into Bob Cavalear today,
13:51:53 19 and he said, you know, Jack, you've got to get something
13:51:57 20 over there. I said, okay. So I went to Bill Schoen,
13:52:02 21 and I talked hard to Bill. I said, Bill, we've got to
13:52:08 22 get going. I said, they paid good prices for lots,
13:52:14 23 145. Todd Berman spent 145, Schoen 145, and Eric
13:52:24 24 Huffman 140. So Bill agreed to build a spec house, and
13:52:29 25 I agreed to back him on it. And -- because they were

13:52:33 1 scared.

13:52:36 2 Q. Scared because of what?

13:52:38 3 A. Well, they were -- he was running out of
13:52:41 4 contracts, you know, and we had to get something.

13:52:44 5 Q. You mean the market?

13:52:45 6 A. The market, yeah. When you're going to build a
13:52:49 7 spec house for \$600,000, I mean, it was -- and it was
13:52:53 8 for empty-nesters, and I just gave him a free hand, and
13:52:57 9 I did cosign for him. And he went ahead and built lot
13:53:01 10 20.

13:53:03 11 And it did sit for a little bit. And finally a
13:53:09 12 couple came across from Eagle Point Colony. They had
13:53:13 13 four children, and they were paying a pretty good price,
13:53:17 14 and they asked me if I would sell them the lot next door
13:53:21 15 to them. They wanted it for a swimming pool. And we
13:53:24 16 put some restrictions on the fencing on, like, the front
13:53:29 17 of the thing and stuff like that, so they bought that,
13:53:31 18 too, at the same time. One of the things you want to
13:53:34 19 do in land development --

13:53:35 20 Q. Would that have been in '02 or '03?

13:53:38 21 A. I beg your pardon?

13:53:39 22 Q. What year was that?

13:53:40 23 A. It was 2004 it was completed. 2004 they started
13:53:57 24 building it. It's a very expensive --

13:54:03 25 Q. Fancy house?

13:54:04 1 A. Huh?

13:54:04 2 Q. Fancy?

13:54:05 3 A. Yeah, it's fancy. It's a fancy house. It's the
13:54:11 4 first house you people might have saw. It's on the
13:54:14 5 left. It's all stone. And it was an empty-nester's
13:54:17 6 house; had a dynamite first floor, master suite, an open
13:54:23 7 kitchen, open living room, open dining room, but the --
13:54:30 8 where the empty-nester part came in is they had a second
13:54:34 9 bedroom behind the garage with a full bath. You might
13:54:37 10 call it a -- where you'd have your grandparents or your
13:54:42 11 parents.

13:54:42 12 Q. Like a mother-in-law suite?

13:54:44 13 A. What's that, Marv?

13:54:45 14 Q. A mother-in-law suite?

13:54:47 15 A. Yeah. I've never heard that, but yeah. We
13:54:50 16 called it a granny suite. But that was there. The
13:54:57 17 second floor was very common. It had a big dorm above
13:55:01 18 the garage.

13:55:03 19 Q. Tell us about the other lots. What happened to
13:55:06 20 them?

13:55:06 21 A. The other lots, Todd Berman took down his in
13:55:14 22 2001, Eric Huffman took down in 2001, and that was the
13:55:19 23 end of that.

13:55:23 24 Then we sold nothing in 2002. But then the
13:55:32 25 first lot we sold to Kevin Stawinski, who testified here

13:55:41 1 the other day, the guy who almost got hit by the --

13:55:45 2 Q. You can't talk about that.

13:55:47 3 A. He sold that to him. It was down a little
13:55:50 4 further. We sold that to him for \$100,000. It was
13:55:54 5 12/30 of '03. We started building lot five, Todd Berman
13:56:04 6 did. We sold that to Manguses after it was completed
13:56:10 7 for \$550,000.

13:56:12 8 Q. When was that completed and sold?

13:56:13 9 A. It was sold on 12 -- on 1/5/04. Okay. It
13:56:23 10 was -- sold it to them for \$560,000. They had two
13:56:29 11 children. The reason I'm going to get to this, there's
13:56:33 12 a purpose of these kids.

13:56:36 13 Then we sold on 2/17/04. We got an offer to
13:56:44 14 purchase for lot 9 for \$120,000. That offer we thought
13:56:51 15 went dead. Later found out is not dead.

13:56:54 16 MR. BAHRET: Your Honor, I object. This
13:56:58 17 has been the subject of a prior ruling.

13:57:06 18 THE COURT: One second, please.

13:57:19 19 I'll sustain that objection and ask the jury
13:57:23 20 to disregard the last comment about the sale or
13:57:33 21 potential sale in 2004.

13:57:39 22 Q. What other lots were sold?

13:57:40 23 A. Okay. Then on 8/26/04 we built -- a house was
13:57:49 24 built and sold to Wade Cohen for \$579,000. Then on
13:58:01 25 1/12/04 Bill Schoen had a contract, oh, and they had two

13:58:05 1 children. On 1/12/04 Bill Schoen sold a contract to a
13:58:13 2 couple by the name of Hughes for \$568,000.

13:58:19 3 Now, if you also check with the Bureau of
13:58:23 4 Statistics, you'll find out that we started to slide
13:58:26 5 into another recession in 2005. But one of the things
13:58:34 6 that we talked about is what we finally came to realize,
13:58:42 7 that we were not selling these houses to empty-nesters.

13:58:46 8 Q. Like you had originally planned?

13:58:49 9 A. Yeah. Original plan was off; the demographics
13:58:53 10 weren't proven. These people were coming in with
13:58:55 11 children. Everybody had children except the Hughes.
13:59:06 12 He's an executive with Owens-Corning Fiberglass. So
13:59:10 13 Tommy and I got together. At that time, I don't know
13:59:13 14 what we had the property listed, we got -- in 2005 we
13:59:18 15 decided to build lot 15. That's the home that you
13:59:22 16 people visited the other day. And we built that for
13:59:28 17 people with kids. And the idea was to downsize it so
13:59:33 18 it wasn't so expensive. We only charged ourselves
13:59:38 19 \$100,000 for a lot instead of what it would have been.
13:59:44 20 We went to First Place Bank in Akron, Ohio and got a
13:59:52 21 loan, a spec loan, speculative loan. We built a house
14:00:02 22 for a couple. We put the master suite on the
14:00:06 23 basement -- the first floor, I beg your pardon. Then a
14:00:09 24 large basement that walked out so, you know, you could
14:00:13 25 fix up the basement. Then we put a large dormer over

14:00:18 1 the garage, but we didn't finish it. It wouldn't take
14:00:22 2 much to finish, about \$5,000, but we wanted to keep the
14:00:26 3 house as low as we could. So then we put two baths and
14:00:29 4 two bedrooms upstairs. And that was to be -- and then
14:00:37 5 we finished that at the end of 2005. Those houses take
14:00:45 6 anywhere from six months to nine months to finish
14:00:51 7 completely.

14:00:55 8 It already has been mentioned before through John
14:00:58 9 McCarthy, his son Mike was a good friend of mine. He
14:01:02 10 had bought a condominium from Tom and I over in another
14:01:06 11 development that we had at Belmont Country Club called
14:01:10 12 Golf Villas. He had bought one of those from us. And
14:01:14 13 he wanted that house. And that's what John was
14:01:19 14 referring to this morning, John McCarthy, his father,
14:01:24 15 that Mike wanted that house. And they kept going back
14:01:28 16 over to the house, kept going back over, his wife and
14:01:31 17 that. And they had two children. They just got
14:01:35 18 married. He and Lori just got married, and they had
14:01:39 19 two children -- or they had one child when they lived in
14:01:45 20 the condo. He said, Jack, I want that house, and Lori
14:01:48 21 wants it.

14:01:49 22 And I said, well, you know. And he had sold a
14:01:54 23 building that my son and I -- my son built and I was in
14:01:59 24 with him, and I wanted to get out of it, and I knew Mike
14:02:02 25 through my son, Steve, who is a builder. And Steve and

14:02:10 1 I had some buildings that I didn't want to be involved
14:02:15 2 in.

14:02:15 3 MR. BAHRET: Your Honor, I'm just going to
14:02:17 4 object to this format. I'm used to a
14:02:20 5 question-and-answer type format instead of a speech.

14:02:23 6 THE COURT: Let's see if we can have a
14:02:26 7 little more give and take.

14:02:28 8 Q. I want you to get more to the point of the
14:02:30 9 marketing of the development. Don't get distracted
14:02:33 10 about all the other little things that happened. We
14:02:36 11 don't want to be here all day.

14:02:37 12 A. Okay. Well, that was it. We wanted to switch
14:02:42 13 to -- every house had kids, and we were working under
14:02:46 14 the wrong assumption, and we made a mistake.

14:02:51 15 Q. How much money did you have put into the house on
14:02:55 16 lot 15?

14:02:56 17 A. \$539,000.

14:02:59 18 Q. And did you then change your marketing strategy?

14:03:04 19 A. Yes.

14:03:05 20 Q. To?

14:03:06 21 A. Well, we were going to -- Lori McCarthy was also
14:03:11 22 a realtor. Mike McCarthy is a commercial realtor.
14:03:15 23 Lori McCarthy -- so we listed it with her and her best
14:03:20 24 friend, because she was pregnant again. And we listed
14:03:24 25 it with Danberry Realty. But we were going to use the

14:03:28 1 house. It's very well furnished as a model. And we
14:03:33 2 were going to go with that as a model.

14:03:39 3 Q. Tell us, there were no sales between January
14:03:48 4 of -- or February of '05 and the beginning of '06.
14:03:53 5 What did you decided to --

14:03:55 6 A. That's when we built lot --

14:03:58 7 Q. After you built, what did you decide to do in the
14:04:00 8 spring of 2006?

14:04:02 9 A. To run an auction.

14:04:06 10 Q. Okay. And why did you decide to do an auction?

14:04:09 11 A. Because auction brings people. It's a sales
14:04:14 12 tool. Now, I agree that auctions have a bad
14:04:17 13 connotation. People think it's a desperation move.
14:04:21 14 But it's not. There's three types of auctions, and the
14:04:26 15 three types are absolute auction, that's where you go in
14:04:29 16 and you bid, and you just -- you go for whatever. Then
14:04:35 17 you can set a base is another one. And the one we
14:04:40 18 choose is, okay, put in an offer, and we'll see if we'll
14:04:43 19 accept it. We'll at least talk to you and see if we
14:04:46 20 could get our price.

14:04:47 21 Q. When did you have the auction scheduled?

14:04:49 22 A. We signed the auction papers on March 28 with
14:04:53 23 Beth through Amy Almeister and Pam Rose. And we set it
14:05:02 24 for June 16.

14:05:03 25 Q. Of '06?

14:05:04 1 A. Of '06, yes.

14:05:06 2 Q. And tell us what happened after March 28 to the
14:05:10 3 subdivision and what happened to the auction?

14:05:15 4 A. Okay. Well, Mike and Lori McCarthy moved in the
14:05:20 5 spec house in February. Sometime after -- I think it
14:05:29 6 was late April, I would stop over there and have dinner
14:05:32 7 with them. They were good friends, and everything was
14:05:36 8 fine. And then they called me, Mike called me. He
14:05:40 9 said, you better get over here. I said, What? He
14:05:43 10 said, they're cutting down your trees. And I said,
14:05:48 11 What? Who's cutting down our trees? He said, I don't
14:05:51 12 know who's cutting down your trees, but they're coming,
14:05:54 13 and you better get over here. So I said, I can't make
14:05:59 14 it right away, but we'll be over there as fast as I can.
14:06:02 15 I went over there, and by the time I got down there, all
14:06:05 16 the trees were gone. And I was pretty -- what's going
14:06:12 17 on? Pretty -- really upset. Because there were two
14:06:16 18 rows of trees. And that's not been brought up very
14:06:21 19 often, but there were two rows of trees. There was a
14:06:25 20 row right on what they call the City -- the railroad
14:06:30 21 property, then our property. But then there's a 68
14:06:37 22 foot -- it was the Toledo terminal tracks.

14:06:42 23 Q. That's where the path is?

14:06:43 24 A. That's where the path is.

14:06:46 25 Q. I should say "was".

14:06:48 1 A. Huh?

14:06:49 2 Q. I should say "was," not "is now."

14:06:51 3 A. Well, and then by then they were laying those big
14:06:57 4 pipes down, which is 66-inch pipes. I mean, they're
14:07:02 5 huge. You and I can walk through them. I can; you
14:07:10 6 can't. I said, What's going on? I said, I know
14:07:14 7 Commissioner Perkins; I said, I'll call him. I said,
14:07:18 8 This has got to be Wood County. They said, Okay. So I
14:07:22 9 called Commissioner Perkins, and I asked him to come up
14:07:29 10 and have breakfast with us and look at this situation,
14:07:33 11 because I thought it was Wood County.

14:07:35 12 Q. Doing the cutting, you mean?

14:07:38 13 A. The cutting, yeah, and the pipes. By then, I
14:07:42 14 can't tell you if the pipes were there yet, but they
14:07:45 15 were in shortly. No, they couldn't have been there
14:07:47 16 because they had to take the cutting and put the pipes
14:07:50 17 down.

14:07:52 18 So Commissioner Perkins came over, and he brought
14:07:57 19 Ray Huber, the county engineer for Wood County. And --

14:08:07 20 Q. And the trees were already gone at this point in
14:08:10 21 time?

14:08:10 22 A. The trees are gone, yeah. Yeah. Ray said
14:08:16 23 yesterday they were there, and he was mistaken.

14:08:20 24 Q. Did Perkins tell you he could help you, or who
14:08:23 25 was doing it?

14:08:24 1 A. Well, he -- they weren't doing it. And then I
14:08:28 2 thought, I live in Wood County; I get my water through
14:08:34 3 the Northwest Sewer. I said, is this the Northwest
14:08:37 4 Sewer? Ray Huber knew about it, but he said, It's not
14:08:40 5 our deal, Jack. He said, it's the City of Toledo is
14:08:44 6 putting a water -- then he explained it, and then Alvie
14:08:49 7 Perkins, we just had a nice conversation, went down and
14:08:53 8 walked it, and end of story as far as Alvie's concerned.

14:08:58 9 Q. What happened with the auction?

14:09:00 10 A. The auction, we cancelled it.

14:09:02 11 Q. Would you tell the jury why you cancelled it?

14:09:04 12 A. We cancelled it because of the cutting of the
14:09:07 13 trees, and also I have to say that we had another
14:09:14 14 subdivision called Rocky Ridge, which was out in
14:09:20 15 Waterville. It's a -- was Rocky Ridge Airport. And
14:09:26 16 we had problems with the bank out there. And so we
14:09:30 17 just -- and then we had another subdivision on Wales
14:09:37 18 Road.

14:09:37 19 Q. That's Birch Hollow that Tom testified about?

14:09:40 20 A. That's Birch Hollow. We were going to do all
14:09:43 21 three. And we got a price for that.

14:09:45 22 Q. For the auction?

14:09:46 23 A. For the auction, yeah, for doing all three. And
14:09:49 24 a lot of -- like I say, auctions bring people. And we
14:09:56 25 were also having -- anyways, long story short, we just

14:10:07 1 cancelled the auction. It was senseless to spend the
14:10:10 2 money -- more money than we had already spent.

14:10:14 3 Q. What did it cost you to cancel the auction?

14:10:17 4 A. \$6,700, \$6,900.

14:10:23 5 Q. What was that for?

14:10:24 6 A. To pay for the advertising. Pam Rose and them
14:10:29 7 had already drew up flyers and that kind of stuff, pay
14:10:35 8 their costs. They were good -- they didn't take any
14:10:39 9 money.

14:10:39 10 Q. And tell the jury how you felt that the cutting
14:10:43 11 of the trees would impact the auction?

14:10:46 12 A. It ruined it. The cutting of the trees have
14:10:50 13 ruined the whole subdivision. It's done. It's shot.

14:11:04 14 Q. Do you feel at this point in time until there is
14:11:07 15 something done with the subdivision that you could sell
14:11:11 16 any lots?

14:11:14 17 A. No. You see, people come down there and they
14:11:22 18 use the cul de sac, you know, the people -- your bus I
14:11:26 19 think maybe turned around. And they go down there and
14:11:29 20 they see that. A lot of times the trains set there;
14:11:35 21 and they're big, and they're ugly, of course.

14:11:37 22 Q. When did you figure out -- let me back up a
14:11:41 23 minute. Why did John McCarthy start hauling that mud
14:11:46 24 in the one day? Was that before the auction, before you
14:11:51 25 cancelled the auction?

14:11:53 1 A. Yeah. Yes. We didn't know until John got
14:11:59 2 involved, and we talked to -- I think he started talking
14:12:03 3 to Christy, John being with the Corps of Engineers, he's
14:12:06 4 a bulldog, really, and he talked to Ray Huber, and he
14:12:14 5 went out there and he said, You've got other problems,
14:12:17 6 Jack. I said, What other problems? I mean, I didn't
14:12:21 7 know about the sewer coming under the railroad or any of
14:12:25 8 that kind of stuff. So John started digging into it.
14:12:28 9 I said, John, you've got to help me. I said, I don't
14:12:31 10 know what to do. We didn't know what to do about this.
14:12:35 11 So he said, Well, you'll have to monitor --

14:12:37 12 MR. BAHRET: Your Honor, not only are we far
14:12:41 13 afield from the question, but he's getting into hearsay.

14:12:44 14 THE COURT: Sustained.

14:12:47 15 Q. With regard to the impact on the subdivision, it
14:12:55 16 is your opinion at this point in time that without some
14:12:58 17 improvement being made to the subdivision, you just
14:13:01 18 can't sell any of the lots?

14:13:02 19 A. Yes.

14:13:03 20 Q. Okay. Can you tell the jury what efforts you
14:13:06 21 have made to figure out how to improve the subdivision
14:13:13 22 with screening or whatever?

14:13:16 23 A. Yeah.

14:13:16 24 Q. Tell the jury what you've done.

14:13:18 25 A. First thing I did was went down to Bowling Green

14:13:22 1 to the Ohio Department of Transportation, and I asked
14:13:25 2 them -- the first thing I thought about was a wall, like
14:13:30 3 they got along -- I didn't -- a wall, you know, like
14:13:35 4 along the turnpike or along the expressway. And I
14:13:39 5 asked the Ohio Department of Transportation who they
14:13:42 6 used. They gave me a couple names. And a guy called
14:13:47 7 me back. I told him my situation; I had 900-and-some
14:13:51 8 feet to -- for a wall. He sent me a quote for
14:14:00 9 \$810,000.

14:14:00 10 I then called Don Larry, who's an architect,
14:14:07 11 landscape architect -- Land Design is his company in
14:14:14 12 Perrysburg -- for the purpose of seeing if you could
14:14:20 13 screen out the -- yes.

14:14:22 14 Q. Go ahead. What did he tell you?

14:14:24 15 MR. BAHRET: Objection.

14:14:25 16 THE WITNESS: What, Marv?

14:14:25 17 Q. What did you learn? What did he tell you?

14:14:29 18 MR. BAHRET: How is that --

14:14:32 19 A. I examined --

14:14:32 20 THE COURT: Hold on.

14:14:34 21 MR. BAHRET: What he learned is going to be
14:14:35 22 synonymous with what he was told.

14:14:38 23 A. I asked him for an estimate.

14:14:40 24 MR. ROBON: You can't talk when there's an
14:14:42 25 objection.

14:14:46 1 THE COURT: Let's try another question,
14:14:48 2 please.

14:14:49 3 BY MR. ROBON:

14:14:49 4 Q. During your investigation, did you arrive at what
14:14:52 5 you thought it would cost you to landscape the rear of
14:14:56 6 those lots?

14:14:57 7 A. Yes.

14:14:58 8 Q. And what was it going to cost you?

14:15:01 9 A. A million-one to a million-three.

14:15:09 10 Q. That's more valuable than the subdivision?

14:15:12 11 MR. BAHRET: Objection.

14:15:13 12 A. Yes.

14:15:13 13 THE COURT: Overruled.

14:15:20 14 A. It's about what we -- on the --

14:15:30 15 Q. Mr. Taylor identified the letter from First
14:15:33 16 Federal that showed there was approximately \$1,367,000 I
14:15:39 17 think due to First Federal Bank on the subdivision?

14:15:41 18 A. Yes.

14:15:42 19 Q. And you saw the exhibit showing that you had
14:15:48 20 roughly -- I think it was a million-nine or close to two
14:15:51 21 million invested in the subdivision?

14:15:52 22 A. Yes.

14:15:53 23 Q. Did you see the City's appraisal on what lot 15,
14:16:01 24 the house is worth?

14:16:02 25 A. \$315,000.

14:16:06 1 Q. And you said you had \$539,000 in it?

14:16:10 2 A. Correct.

14:16:14 3 Q. Do you believe that the -- explain why you think
14:16:17 4 the property went down in value by what, \$225,000 or
14:16:22 5 whatever?

14:16:22 6 A. Well, it's in foreclosure. After they cut the
14:16:27 7 trees down, I said, I'm not going to pay for a dead
14:16:32 8 horse. So I notified the bank that we had -- what we
14:16:37 9 were doing, and I said, You can foreclose on it if you
14:16:40 10 want. I know from the title business that they run an
14:16:46 11 appraisal, and they can sell it for two-thirds of the
14:16:52 12 appraised value.

14:16:53 13 Q. I'm handing you or marking what we've shown as
14:16:56 14 Exhibit 89. This is a foreclosure that was filed on
14:17:01 15 January 14 of this year?

14:17:03 16 A. Right.

14:17:03 17 Q. And you're name personally with Mr. Taylor as
14:17:07 18 defendant?

14:17:09 19 A. Yes.

14:17:10 20 Q. Why is that?

14:17:11 21 A. Every note you sign with the bank you sign
14:17:14 22 personally, including the subdivision.

14:17:36 23 Q. I'm going to mark Exhibit 117. When you first
14:17:49 24 started the subdivision, I see that you put Laskey
14:17:54 25 Taylor on the -- what do you call that, the name plate?

14:17:59 1 A. Yeah.

14:18:00 2 Q. Is that something unusual, or were you very proud
14:18:03 3 of this subdivision?

14:18:04 4 A. Very proud of it.

14:18:06 5 Q. And does that photograph accurately depict the
14:18:10 6 front entryway?

14:18:11 7 A. Did it what, Marv?

14:18:12 8 Q. Does it accurately depict the front entryway?

14:18:15 9 A. Yeah. Yes. The fence is the same as the
14:18:19 10 mansion across the street.

14:18:25 11 Q. And let's take a look at Exhibit 119. Is that a
14:18:53 12 photograph of the front entry gait?

14:18:55 13 A. Yes.

14:18:56 14 Q. And tell the jury why you went through the
14:18:58 15 expense of putting stone out in front and the iron
14:19:04 16 gates -- iron railings and gates by the entryway?

14:19:09 17 A. We intended to make it a gate community where you
14:19:12 18 pushed a button to get in.

14:19:16 19 MR. ROBON: Your Honor, can I pass this to
14:19:18 20 the jury since it doesn't show up well?

14:19:20 21 THE COURT: Any objection?

14:19:21 22 MR. BAHRET: No.

14:19:22 23 THE COURT: You may.

14:19:30 24 Q. And I'm going to lastly do Exhibit 120. This
14:19:34 25 shows the -- I think that's the first house that was

14:19:37 1 built in the background?

14:19:38 2 A. Yes.

14:19:38 3 Q. Is that the fancy home you were talking about?

14:19:41 4 A. Yes.

14:19:44 5 MR. ROBON: Your Honor, can I pass that to
14:19:45 6 the jury also?

14:19:49 7 THE COURT: We're going to interrupt the
14:19:51 8 flow here. Why don't you just stand and walk in front
14:19:54 9 of the box and show it quickly. I don't know how many
14:19:57 10 you have there.

14:19:58 11 MR. ROBON: I just have three.

14:20:11 12 BY MR. ROBON:

14:20:13 13 Q. Jack, did you feel that by doing this -- let me
14:20:16 14 back up. What's directly across the street from your
14:20:19 15 entryway?

14:20:21 16 A. Our entryway is the Lawrence estate; he's a brain
14:20:25 17 surgeon and she's an attorney.

14:20:28 18 Q. Very, very large home on the river?

14:20:31 19 A. I beg your pardon?

14:20:33 20 Q. It's a very large home on the river?

14:20:36 21 A. Oh, yeah, very.

14:20:37 22 Q. Were you doing this upscale to try to keep that
14:20:40 23 same concept in the neighborhood?

14:20:42 24 A. Exactly.

14:20:55 25 Q. I'm going to hand you what's been marked as

14:20:58 1 Exhibit 88. This is a foreclosure from the county; is
14:21:08 2 that correct?

14:21:08 3 A. On the what?

14:21:08 4 Q. From the county?

14:21:10 5 A. Oh, on the taxes, yes.

14:21:12 6 Q. Yes. And the county is -- you didn't pay the
14:21:18 7 taxes for the last couple years?

14:21:20 8 A. No.

14:21:20 9 Q. And you haven't made the mortgage payments for
14:21:22 10 the last couple of years?

14:21:24 11 A. Not since they tore down the trees.

14:21:26 12 Q. How much would the mortgage payments have been?
14:21:30 13 It's almost two years to the date when the trees were
14:21:34 14 taken out.

14:21:34 15 MR. BAHRET: Objection as to the relevance.

14:21:37 16 THE COURT: Just a moment, please.

14:21:47 17 I tend to agree.

14:21:48 18 MR. ROBON: Your Honor, it's an item of
14:21:50 19 damage, the interest that would have been accrued on the
14:21:52 20 bank loan because there could be no sale of lots.

14:21:57 21 MR. BAHRET: They were already not selling
14:21:59 22 lots, and there's no link.

14:22:02 23 THE COURT: I haven't heard all the evidence
14:22:04 24 yet, so for now I'll allow it. You may answer.

14:22:07 25 BY MR. ROBON:

14:22:07 1 Q. What amount of interest would have accrued on the
14:22:11 2 million-three-plus that was owed for the last two years?

14:22:14 3 A. I have it in my book there. If you want to hand
14:22:23 4 me that green book.

14:22:43 5 We owe in principal \$1,186,877.09 as of April 30.

14:22:57 6 Q. And how much in interest is owed?

14:23:00 7 A. \$136,927.70 for a total of 1,324,704.79.

14:23:13 8 Q. What's the interest rate?

14:23:14 9 A. The interest rate is -- I think it's -- I haven't
14:23:30 10 paid attention.

14:23:31 11 Q. I think it's six and a half percent. I think
14:23:34 12 that's what it is?

14:23:36 13 THE COURT: Will we stipulate.

14:23:39 14 MR. BAHRET: I don't know what it is.

14:23:40 15 MR. ROBON: It's on that other one we had
14:23:42 16 marked.

14:23:43 17 MR. BAHRET: I never thought it was relevant
14:23:45 18 to read it.

14:23:46 19 A. Just a minute. It goes -- range from 7 percent
14:23:51 20 to 6.25.

14:24:00 21 Q. First Federal Bank has the mortgage on the
14:24:03 22 subdivision, correct?

14:24:04 23 A. Correct.

14:24:05 24 Q. They have not filed a foreclosure awaiting the
14:24:08 25 outcome of this lawsuit, correct?

14:24:10 1 A. Correct.

14:24:10 2 MR. BAHRET: Objection. Your Honor, I move
14:24:14 3 that be stricken.

14:24:15 4 THE COURT: I will sustain that objection,
14:24:17 5 strike the question and answer, and the jury will
14:24:19 6 disregard both the question and the answer.

14:24:22 7 BY MR. ROBON:

14:24:22 8 Q. In Exhibit 88 it shows all these parcels. These
14:24:26 9 are the empty lots. Do you know how much the taxes are
14:24:33 10 per annum on the vacant lots? Are they roughly
14:24:45 11 \$36,000? Do you recall that number?

14:24:48 12 A. I haven't looked at -- I've got the sheet here.

14:24:52 13 Q. Well, take a look?

14:25:08 14 A. No. Total tax due, \$177,543.80.

14:25:25 15 Q. So you haven't paid the taxes for the last two or
14:25:28 16 two and a half years, correct?

14:25:30 17 A. No, I have not.

14:25:37 18 Q. How has this action of the City impacted you
14:25:43 19 personally?

14:25:44 20 A. Personally, I'm about an inch from bankruptcy.

14:26:03 21 MR. ROBON: Just give me a moment, Your
14:26:05 22 Honor.

14:26:05 23 THE COURT: Sure.

14:26:33 24 MR. ROBON: No further questions, Your
14:26:36 25 Honor.

14:26:36 1 THE COURT: Any cross?

14:26:37 2 MR. BAHRET: Thank you.

14:26:39 3 - - -

14:26:39 4 JOHN LASKEY, CROSS-EXAMINATION

14:26:40 5 BY MR. BAHRET:

14:26:40 6 Q. Could I see whatever you're referring to up here
14:26:57 7 while you're testifying?

14:26:57 8 A. What's that, Bob?

14:26:58 9 Q. Can I see what you have been looking at to
14:27:01 10 testify?

14:27:01 11 A. That's my notes.

14:27:02 12 Q. I know; that's why I asked for them. Can I see
14:27:04 13 those?

14:27:06 14 And what did you find in this book that told the
14:27:09 15 answer on taxes?

14:27:10 16 A. The stuff I dug out.

14:27:12 17 Q. Can you show me?

14:27:24 18 A. (Document exchanged.)

14:27:30 19 Q. Thank you.

14:27:43 20 If I'm reading this right, sir -- if I'm reading
14:27:54 21 this right, you had stopped paying your taxes back in
14:27:57 22 2003.

14:27:58 23 A. Well, that's true.

14:28:04 24 Q. Okay. That's very interesting.

14:28:06 25 A. That may not be true.

14:28:08 1 Q. Well, it says it's true right there. It says
14:28:10 2 you're delinquent from the second half of 2003. You
14:28:17 3 haven't paid your taxes in five years?

14:28:19 4 A. That's right, probably.

14:28:21 5 Q. You're not going to stare at this jury and tell
14:28:23 6 us that's because the trees were cut down?

14:28:29 7 A. First of all, if you're in a land development
14:28:33 8 business, they don't get assessed right away, okay. And
14:28:38 9 I was more interested -- Tom and I were more interested
14:28:46 10 in paying the bank, okay. You can go down and make
14:28:49 11 arrangements with the county treasurer, and you can go
14:28:52 12 on an installment plan. Anybody that has delinquent
14:28:57 13 taxes can go down. You try to -- first of all, you
14:29:02 14 think you're going to sell these things, okay. And then
14:29:06 15 you --

14:29:06 16 Q. The question was just --

14:29:08 17 A. Okay.

14:29:09 18 Q. -- you haven't paid the taxes in five years,
14:29:13 19 right?

14:29:13 20 A. That's right.

14:29:14 21 Q. And the \$177,000 number that you told this jury
14:29:20 22 goes back three years before any trees were cut down?

14:29:26 23 A. So.

14:29:27 24 Q. In your mind is the City of Toledo responsible
14:29:30 25 for that?

14:29:33 1 A. No, I wouldn't say they're responsible for that.

14:29:36 2 Q. Okay. Are you current on your obligations for
14:29:46 3 the other two developments?

14:29:48 4 A. Yes. Can I have my paper back, please?

14:29:55 5 Q. Do you need it to answer that? Any time you need
14:29:58 6 this to answer a question, let me know, but I'm not done
14:30:01 7 looking at it yet.

14:30:03 8 Rocky Ridge, Old Granite owns that, right?

14:30:06 9 A. Yes.

14:30:07 10 Q. And Birch Hollow is the other one?

14:30:09 11 A. Yes.

14:30:10 12 Q. They're both at a standstill; is that right?

14:30:14 13 A. No. Yes. No.

14:30:18 14 Q. Let's settle on one.

14:30:24 15 A. Let's take one at a time.

14:30:25 16 Q. You haven't sold anything in Rocky Ridge?

14:30:27 17 A. No.

14:30:28 18 Q. And you haven't sold a lot in Birch Hollow since
14:30:32 19 2004?

14:30:32 20 A. Correct. But --

14:30:36 21 Q. What?

14:30:37 22 A. But all 34 lots in Birch Hollow are sold -- have
14:30:47 23 a purchase contract that was executed with Claystone
14:30:53 24 Builders.

14:30:53 25 Q. But Claystone ran out of money?

14:30:56 1 A. Correct.

14:30:56 2 Q. So they can't follow through on that contract?

14:30:58 3 A. No.

14:30:59 4 Q. So you're left holding the bag?

14:31:01 5 MR. ROBON: Your Honor, could I let the
14:31:04 6 witness please finish his answer?

14:31:06 7 THE COURT: Sure. You disagree with the
14:31:08 8 outline given by the lawyer?

14:31:11 9 THE WITNESS: I beg your pardon, Judge?

14:31:13 10 THE COURT: The question was: Apparently
14:31:18 11 there were 34 lots. There was a purchase contract. And
14:31:22 12 the question was, the first question: Claystone ran out
14:31:26 13 of money, and that's why you didn't complete the deal?

14:31:29 14 THE WITNESS: What we did -- do you want me
14:31:31 15 to say what we did?

14:31:32 16 THE COURT: First answer whether Claystone
14:31:34 17 ran out of money and did not complete the deal.

14:31:37 18 THE WITNESS: No. There's another story
14:31:39 19 here.

14:31:39 20 THE COURT: Okay. So the answer is no.

14:31:43 21 THE WITNESS: No. Okay.

14:31:44 22 THE COURT: Is it? Then you can explain.
14:31:47 23 I just want to get a yes or no.

14:31:49 24 THE WITNESS: We're still working with them.
14:31:51 25 Okay. And how we're working with them is what they

14:31:59 1 found out is they were building Villas, the Villas. We
14:32:03 2 sold them the lots for \$38,000. They built Villas.
14:32:10 3 The market changed, and people went to single-family.
14:32:16 4 And a good -- you're probably familiar with McCarthy
14:32:24 5 homes. He's kind of the pacesetter on these. He went
14:32:28 6 to single-family. People went from Villas, twinplexes,
14:32:33 7 condos, to empty-nesters -- or not empty-nesters, but to
14:32:39 8 single-families; zero lot line, you still cut the grass
14:32:43 9 and everything.

14:32:44 10 So Claystone came to me about a year ago,
14:32:50 11 and they said, Jack, you've got to go to the City of
14:32:54 12 Northwood. It's not in Rossford; it's in Northwood.
14:32:59 13 And we're still not in. Got the zoning changed so that
14:33:05 14 Claystone could still continue on, try to; however, they
14:33:17 15 did have a couple sales, but I have not kept track of
14:33:21 16 them because I'm turning the subdivision back.

14:33:25 17 BY MR. BAHRET:

14:33:25 18 Q. You did what?

14:33:27 19 THE COURT: He turned the subdivision back.

14:33:30 20 Q. So you're not part of that operation anymore?

14:33:32 21 A. Well I'm still -- still haven't made the deal
14:33:35 22 with the bank yet. But we're negotiating with them.

14:33:40 23 Q. The fact of the matter is even though you're
14:33:45 24 hoping something turns around, no lots have moved since
14:33:49 25 2004?

14:33:49 1 A. No.

14:33:51 2 Q. All right. On the listing of houses that you
14:33:56 3 claim sold in Cambridge, when you told the jury there
14:34:00 4 was some activity, like, in 2005 when Bill Schoen sold a
14:34:04 5 house --

14:34:05 6 A. Yes.

14:34:05 7 Q. That didn't make any money for you?

14:34:07 8 A. Yes, it did.

14:34:09 9 Q. That was Bill Schoen's house that he, according
14:34:12 10 to this document, his company bought from you in 2002.
14:34:16 11 He bought the dirt from you in 2002?

14:34:19 12 A. Are you sure?

14:34:20 13 Q. That's what it says on this document your
14:34:23 14 attorney -- right here. Look at this, sir.

14:34:30 15 A. I made money, paid the bank.

14:34:33 16 Q. Yeah, but in 2002.

14:34:42 17 A. Okay.

14:34:42 18 Q. And then when the builder pays you for the dirt,
14:34:48 19 and thereafter the builder three years later sells a
14:34:51 20 house that he built on it, that isn't money in Old
14:34:57 21 Granite's pocket?

14:34:58 22 A. No. He got his profit.

14:35:01 23 Q. So if we're talking about lots that Old Granite
14:35:03 24 sold, the answer to that question -- and I'll give you
14:35:07 25 your sheet back -- the last lot sold in Old Granite was

14:35:14 1 exactly what I told this jury before, January of 2004?

14:35:28 2 A. The last one what, Bob?

14:35:30 3 Q. The last lot that Old Granite sold, January of
14:35:33 4 2004?

14:35:39 5 THE COURT: In Cambridge?

14:35:42 6 MR. BAHRET: Correct.

14:35:46 7 A. Well, I don't know when we sold. We sold a house
14:35:53 8 in 8-26 --

14:35:56 9 MR. ROBON: Can you speak up? I can't hear
14:35:58 10 you.

14:35:59 11 THE COURT: He's talking to himself until he
14:36:01 12 comes up with an answer.

14:36:05 13 THE WITNESS: How do you like not hearing?

14:36:09 14 A. Cohen, I guess, is the last one.

14:36:18 15 Q. Let's go through a number of matters. If I can
14:36:23 16 speed this up a bit, several topics to talk about. Is
14:36:26 17 it true, sir, all three of the builders pulled out of
14:36:29 18 the arrangement?

14:36:29 19 A. Yes.

14:36:30 20 Q. And that was back in December of 2003?

14:36:33 21 A. That's about -- yeah.

14:36:35 22 Q. And they pulled out because they were absolutely
14:36:38 23 frustrated that this development was going nowhere?

14:36:41 24 A. No.

14:36:42 25 Q. They pulled out because they were happy about the

14:36:44 1 development?

14:36:45 2 A. No. First of all, you have to realize that Bill
14:36:53 3 Schoen is no longer in business. Eric Huffman has gone
14:36:59 4 to straight remodeling. Todd Berman shut his operation
14:37:03 5 down in Petoskey; he shut down his operation in
14:37:09 6 Columbus. He, for a guy that builds million-dollar
14:37:14 7 houses, multi-million-dollar houses, and I don't mean
14:37:18 8 this as any putdown to him, but he was at the home show.
14:37:25 9 I had one back in the title business, and he was there.
14:37:29 10 And I said, Bill -- Todd, I said, this guy's big time.
14:37:40 11 I mean, really big time. And he said -- I said, How
14:37:44 12 are you doing? What are you doing here? He's got two
14:37:48 13 companies, one Mercedes, another one, whatever. I said,
14:37:56 14 What are you doing here? He said, Surviving.
14:38:00 15 Everybody is surviving.

14:38:01 16 Q. This all happened back in 2003 when the market
14:38:04 17 was booming?

14:38:05 18 A. The market was not booming.

14:38:07 19 Q. In 2003?

14:38:08 20 A. No.

14:38:08 21 Q. Okay. But that's when all three of them the same
14:38:11 22 month pulled out of the development?

14:38:13 23 A. Yes.

14:38:20 24 Q. Mr. McCarthy, Mike McCarthy, who lives in that
14:38:24 25 spec house on 15.

14:38:25 1 A. Yes.

14:38:26 2 Q. His first few months was kind of a trade. He
14:38:32 3 was going to live there and trade for a service he
14:38:35 4 performed for you over in Briarfield?

14:38:39 5 A. Yes.

14:38:39 6 Q. But he long since used up that grace period?

14:38:42 7 A. Yes.

14:38:42 8 Q. And he's not paying rent like he's supposed to,
14:38:46 9 is he?

14:38:46 10 A. No.

14:38:47 11 Q. So you're getting no revenue from the spec house
14:38:51 12 on lot 15?

14:38:52 13 A. No.

14:38:53 14 Q. And you should be getting \$3,000 a month?

14:38:55 15 A. Yes.

14:38:58 16 Q. Are you evicting him?

14:38:59 17 A. No.

14:39:06 18 Q. Sir, is it true that you have no idea why the
14:39:12 19 sales are the way they have been in the last few years;
14:39:16 20 in other words, the lack of sales?

14:39:18 21 A. The recession.

14:39:21 22 Q. Nobody bought a lot, constructed anything
14:39:28 23 abutting the railroad tracks other than you for the spec
14:39:33 24 house?

14:39:33 25 A. Yes, the one I'm not allowed to mention.

14:39:40 1 Q. And even before the trees were cut, sir, you
14:39:42 2 could hear the trains if they passed?

14:39:45 3 A. No.

14:39:45 4 Q. Somebody with normal hearing could hear the
14:39:48 5 trains pass?

14:39:49 6 A. I suppose. But I'd like to quote something on
14:39:54 7 that.

14:39:54 8 Q. What's that?

14:39:55 9 A. I'd like to make a comment on that.

14:39:58 10 Q. I think you've answered the question. And I
14:40:00 11 hope you don't think what I said was an insult.

14:40:03 12 A. No. No.

14:40:11 13 Q. Is it true, sir, that when the subdivision was
14:40:15 14 built that your contractor cleared the Cambridge
14:40:20 15 property all the way to the back property line?

14:40:24 16 A. I don't know about that because Tommy is -- takes
14:40:30 17 care of the construction. I walked -- you know, I've
14:40:37 18 done a number of subdivisions, and you do not take down
14:40:41 19 trees unless you absolutely have to. Trees are a
14:40:44 20 value. People like trees.

14:40:54 21 Q. This is at your deposition, and you remember
14:40:56 22 being deposed in your attorney's office, correct?

14:40:59 23 A. Yes.

14:41:03 24 THE COURT: You might want to increase the
14:41:05 25 brightness. It's awfully dark.

14:41:21 1 Q. Can you read that now, sir? That's page 42 of
14:41:25 2 your deposition. Are you able to read it, sir?

14:41:28 3 A. Yes.

14:41:29 4 Q. And at that time you were asked: "So you don't
14:41:33 5 know if in the development of Cambridge all the lots
14:41:36 6 that face the railroad were actually -- you cleared as
14:41:40 7 far back as your property line? You don't know if
14:41:45 8 that's true?"

14:41:46 9 And your answer is: "Probably."

14:41:49 10 Do you see that?

14:41:50 11 A. I don't know what you meant by cleared.

14:41:52 12 Q. You don't know what "cleared" means?

14:41:53 13 A. Do you mean cut the grass, or what are you
14:41:56 14 talking about.

14:41:58 15 Q. Mr. Laskey, you know what it means to clear the
14:42:02 16 land; do you not?

14:42:04 17 A. Yes.

14:42:06 18 Q. And when you answered that question, you answered
14:42:09 19 truthfully? I mean, your assumption was they cleared
14:42:15 20 the back of the property?

14:42:17 21 A. But what are you talking about? By cleared,
14:42:25 22 what are you talking about? Are you taking down trees?
14:42:29 23 Are you clearing rocks? Are you picking up junk? What
14:42:34 24 are you talking about? Are you saying taking down
14:42:37 25 trees and evergreens and everything else? No. We

14:42:42 1 wouldn't take down trees. Now, did we push it back?

14:42:45 2 I don't know.

14:42:47 3 Q. You know what the word "cleared" means, though;
14:42:50 4 do you not?

14:42:51 5 A. Yeah.

14:42:53 6 Q. All right. And I correctly read your deposition
14:42:56 7 transcript on that page?

14:42:58 8 A. I beg your pardon?

14:43:00 9 Q. I correctly read your testimony?

14:43:02 10 A. Yes.

14:43:06 11 Q. The subdivision, the development never intended
14:43:10 12 to tap into the railroad's drainage lines, did it?

14:43:14 13 A. No.

14:43:17 14 Q. So far as you know, Mr. McCarthy had no
14:43:20 15 permission to do so?

14:43:22 16 A. No. I don't think he ever intended to.

14:43:25 17 Q. He accidentally tapped into their line?

14:43:28 18 A. Well, no, I don't think he did. I don't think
14:43:31 19 he tapped into it.

14:43:33 20 Q. Well, he said he did.

14:43:35 21 A. What do you mean by tapped into it?

14:43:38 22 Q. Knocked a hole in the side of their pipe and
14:43:41 23 joined his pipe in there.

14:43:42 24 A. Oh, to get rid of the water or something? I
14:43:47 25 don't know. I'm not John McCarthy. I wasn't there

14:43:50 1 everyday.

14:43:51 2 Q. All right. Is it true that you never asked
14:43:54 3 Ric-man to stop doing whatever they were doing when they
14:43:57 4 were there?

14:43:58 5 A. I walked around the one day, I believe with John
14:44:03 6 McCarthy, and I ran into one of the workmen.

14:44:07 7 Q. This will go a lot faster if you can answer yes
14:44:12 8 or no. Did you tell him to stop?

14:44:14 9 A. No.

14:44:17 10 Q. And Ric-man, just so everybody knows, I think
14:44:20 11 they already do, that's the contractor that was
14:44:22 12 installing the pipes?

14:44:24 13 A. Yes.

14:44:27 14 Q. Is it true that the very first thing that you
14:44:29 15 consulted John McCarthy about was water on the property?

14:44:36 16 A. I don't know what was the first thing. We had
14:44:39 17 talked about the whole thing, what were we going to do.

14:45:06 18 Q. The question on page 62.

14:45:10 19 A. Yes.

14:45:11 20 Q. "What was the issue when you first consulted with
14:45:14 21 him?"

14:45:15 22 And you'll see his name higher up on the page.
14:45:18 23 Let me see if this works.

14:45:20 24 A. Yes.

14:45:21 25 Q. "What was the issue when you first consulted with

14:45:28 1 him?" Meaning McCarthy.

14:45:30 2 Answer: "First, the starting to get water in
14:45:34 3 their back yard, the cutting of the trees, the whole
14:45:37 4 thing."

14:45:37 5 A. That's what I just said, wasn't it?

14:45:39 6 Q. But water, that's what I'm trying to get at.

14:45:42 7 Water was big, correct?

14:45:44 8 A. Yeah.

14:45:44 9 Q. It was a problem already?

14:45:46 10 A. Yes.

14:45:46 11 Q. And that was before the pipeline was installed?

14:45:54 12 A. Yeah.

14:45:55 13 Q. Okay. And that's what you were telling me on the
14:46:06 14 next page. You needed to consult with him about the
14:46:10 15 water?

14:46:11 16 A. Yes.

14:46:13 17 Q. And again, that is before the construction of the
14:46:17 18 pipeline?

14:46:20 19 A. I would assume so.

14:46:27 20 Q. And, in fact, back when you were under oath, you
14:46:30 21 told us that. You said that the flooding problem
14:46:34 22 was -- or this is the question:

14:46:35 23 "Your flooding problem was already in existence
14:46:39 24 before that drainage pipe was cut?"

14:46:41 25 And you said, "Yes, I would assume it was."

14:46:44 1 And you stand by that today?

14:46:46 2 A. I would assume so.

14:46:49 3 MR. ROBON: Your Honor, could we have him
14:46:52 4 leave the thing up so he can read the next question and
14:46:55 5 answer.

14:46:55 6 THE COURT: Sure. If it's appropriate.
14:47:00 7 If it's on the same topic.

14:47:13 8 Q. Again, two pages later, page 68, you again tell
14:47:18 9 us on this line, "It was before the pipe was put in the
14:47:23 10 ground."

14:47:26 11 All right. So you got it four or five places in
14:47:29 12 the deposition telling us the same thing, and you'd
14:47:32 13 stand by that? That problem with standing water that
14:47:35 14 you were addressing an engineer about was most
14:47:38 15 definitely before the pipe was cut, correct?

14:47:43 16 A. I don't know when they cut -- you mean the City
14:47:48 17 pipe underneath the railroad?

14:47:49 18 Q. It was before the waterline was installed, the
14:47:53 19 water main. That's what all those references we just
14:47:59 20 went through said?

14:48:00 21 A. Okay.

14:48:00 22 Q. Okay? Now, sir, you know there's been a couple
14:48:07 23 pictures produced in discovery that showed tree stumps
14:48:10 24 where a tree was cut?

14:48:11 25 A. Yes.

14:48:12 1 Q. That are as much as 10 or 15 feet on the
14:48:16 2 Cambridge property. We've talked about that before,
14:48:19 3 right?

14:48:19 4 A. Right.

14:48:20 5 Q. Who cut those down? Because I know even you
14:48:23 6 don't allege that anybody from Vermillion did. Who cut
14:48:26 7 those trees down?

14:48:27 8 A. I don't know.

14:48:28 9 Q. But you know that Vermillion did not go onto
14:48:32 10 Cambridge property anywhere near that far, if they went
14:48:36 11 on at all?

14:48:37 12 A. The ones that were chopped off, the ones we've
14:48:40 13 been showing every day?

14:48:41 14 Q. Those aren't 15 feet into your property, are
14:48:44 15 they?

14:48:44 16 A. No, those are right along.

14:48:46 17 Q. Right along the property line?

14:48:48 18 A. Yes.

14:48:48 19 Q. But what I'm asking you is the tree stumps that
14:48:51 20 are further in, ten or 15 feet into your property,
14:48:54 21 somebody cut trees down. You don't know who it was?

14:48:58 22 A. No. Those are old trees, aren't they?

14:49:06 23 Q. I don't know. I don't know how to tell the age
14:49:10 24 of a tree that's not there.

14:49:14 25 A. You can look at the bark.

14:49:16 1 Q. I can do what?

14:49:18 2 A. At the bark or whatever's there.

14:49:20 3 Q. That would tell me how old it was before it got
14:49:23 4 cut down. I don't think it keeps making rings after
14:49:27 5 it's chopped.

14:49:29 6 Would you agree, sir, the main reason the auction
14:49:31 7 was cancelled -- or the main reason the auction was
14:49:34 8 scheduled was to give attention to Rocky Ridge?

14:49:38 9 A. Yes.

14:49:38 10 Q. And would you agree that cutting down the trees
14:49:40 11 in Cambridge had nothing to do with Rocky Ridge?

14:49:45 12 A. No, they had nothing to do with each other.

14:49:48 13 Q. But even though the primary purpose of this
14:49:50 14 auction that you talked about had something to do with a
14:49:52 15 different development, you cancelled the auction?

14:49:56 16 A. No. It had to do with all three developments.
14:50:02 17 I told you that. There were signs put up and
14:50:05 18 everything else on all three properties.

14:50:07 19 Q. But the primary reason for the auction, though,
14:50:10 20 was Rocky Ridge?

14:50:12 21 A. Rocky Ridge.

14:50:13 22 Q. You were going to try to move all three?

14:50:16 23 A. Yes.

14:50:16 24 Q. But the primary stumbling block for you at that
14:50:19 25 time was Rocky Ridge?

14:50:21 1 A. I -- yeah, I would suppose. Because people --

14:50:30 2 Q. Is it true that your company is doing absolutely
14:50:33 3 nothing to try to sell lots in Cambridge right now?

14:50:36 4 A. No.

14:50:36 5 Q. That's not true or --

14:50:39 6 A. We're not trying to do anything.

14:50:40 7 Q. Okay. And the reason for that is what?

14:50:44 8 A. It's a dead dog. I'm not going to put money in
14:50:50 9 a dead horse.

14:50:53 10 Q. Did you listen to your witness this morning,
14:51:00 11 Keesey, or whatever his name was?

14:51:02 12 A. Yeah.

14:51:03 13 Q. I mean, are you aware of the fact that he says
14:51:16 14 the lots still have value?

14:51:21 15 A. Try it again, Bob.

14:51:23 16 Q. I'm sorry. Are you aware of the fact that Mr.
14:51:27 17 Keesey says that these lots still have value?

14:51:31 18 A. I disagree with him.

14:51:33 19 Q. Okay. And are you aware of the fact that he
14:51:38 20 described value as being what a willing buyer would pay
14:51:42 21 to a willing seller?

14:51:44 22 A. Yes.

14:51:45 23 Q. And as they told us in law school, when neither
14:51:48 24 one of them are under compulsion to sell, nobody's
14:51:53 25 holding a gun to their head, right?

14:51:55 1 A. I don't know. I didn't go to law school.

14:51:57 2 Q. Well, and he says that you can sell these lots,
14:52:03 3 the combined value of the remaining lots -- and actually
14:52:07 4 not even all the lots, just the ones that are on that
14:52:10 5 end that you can see the railroad, for \$620,000. And
14:52:15 6 then the lots that are up closer to the gate, those
14:52:18 7 still are worth what, \$145,000 or something?

14:52:23 8 A. We've got them priced at that, yeah.

14:52:26 9 Q. And the bottom line is that if you believe your
14:52:29 10 own expert, you could be selling all these things for a
14:52:33 11 combined total of somewhere near a million dollars.
14:52:36 12 And you think he's flat wrong? He's off by a million
14:52:40 13 dollars?

14:52:40 14 A. Yeah.

14:52:40 15 Q. Because it's worth nothing?

14:52:42 16 A. Nobody is going to buy those lots with the
14:52:47 17 railroad. You were there. You saw it. Would you?

14:52:52 18 Q. Sir, I'm not allowed to give answers.

14:52:56 19 THE COURT: Let's stop the chatter, please.
14:52:58 20 Let's just get to a question and answer.

14:53:10 21 BY MR. BAHRET:

14:53:10 22 Q. Do you have any idea why nobody has purchased a
14:53:17 23 lot abutting the railroad? And this is even before the
14:53:23 24 trees are cut.

14:53:24 25 A. I know. I know what you're saying. I think

14:53:27 1 that -- I would have bought one of those lots before I
14:53:34 2 bought Kevin's. Kevin's was okay; the lot next to Kevin
14:53:39 3 is really bad.

14:53:40 4 Q. Kevin is the guy that testified?

14:53:43 5 A. The young blonde man.

14:53:45 6 Q. Lot 7, was it?

14:53:47 7 A. I beg your pardon?

14:53:49 8 Q. Lot 7, I think?

14:53:51 9 A. Yes.

14:53:53 10 Q. But nobody got down near the train themselves;
14:53:57 11 nobody bought a lot down there?

14:53:59 12 A. No. That's what we were trying to encourage
14:54:02 13 when we built on lot 15. I would buy a lot there, yes.

14:54:09 14 Q. But you understand, and I hear you, I hear you
14:54:12 15 saying you'd buy a lot, and I believe you. But would
14:54:16 16 you agree that's an issue for some people in the market?

14:54:20 17 A. What's that, Bob?

14:54:21 18 Q. Being that close to the railroad tracks.

14:54:22 19 A. Sure.

14:54:27 20 Q. I mean, there isn't any doubt in your mind that
14:54:31 21 the same development in a good location without the
14:54:35 22 railroad track would be a little more attractive than
14:54:39 23 the one development near the tracks?

14:54:41 24 A. If we were overlooking the river, yeah, sure,
14:54:46 25 that's something more attractive than that.

14:54:49 1 Q. If you were on the other side of River Road it
14:54:51 2 would be a lot more money, correct?

14:54:55 3 A. No.

14:54:56 4 Q. If you had property abutting the river itself,
14:54:59 5 that's not more valuable?

14:55:00 6 A. Well, sure, River Road -- anything on water,
14:55:05 7 whether it's a lake, a pond. You go to a regular
14:55:09 8 subdivision, and the houses on a pond draw more money
14:55:14 9 than a regular street lot.

14:55:20 10 Q. Mr. Laskey, if I already asked you this, forgive
14:55:23 11 me, but you know Cambridge was, in fact, a farm field
14:55:25 12 before you bought it?

14:55:27 13 A. I beg your pardon?

14:55:28 14 Q. You know that Cambridge was a farm field?

14:55:32 15 A. Yes.

14:55:35 16 Q. And you and your partner decided to clear the
14:55:39 17 property for development?

14:55:41 18 A. Yes.

14:55:41 19 Q. Your partner was Mr. Taylor?

14:55:44 20 A. Correct.

14:55:54 21 Q. And the decision was made, when you made a
14:55:57 22 decision how far to clear, the decision was to clear all
14:56:01 23 the way up to the railroad right-of-way, correct?

14:56:03 24 MR. ROBON: Objection. Asked and answered
14:56:05 25 three times.

14:56:06 1 THE COURT: Just a moment, please.

14:56:13 2 Has that question been asked of this
14:56:15 3 witness?

14:56:19 4 MR. ROBON: He put up page 67.

14:56:22 5 MR. BAHRET: We did talk about it once.

14:56:23 6 THE COURT: Then I'll sustain the objection.

14:56:26 7 MR. BAHRET: I had another reference in the
14:56:27 8 deposition where he said it again.

14:56:29 9 THE COURT: We already covered it once.

14:56:31 10 Let's not replot the ground.

14:56:37 11 THE WITNESS: Can I make a point?

14:56:40 12 THE COURT: Your lawyer has asked that you
14:56:42 13 not make the point, and I sustained it.

14:56:47 14 BY MR. BAHRET:

14:56:47 15 Q. You would agree with me, Mr. Laskey, that you
14:56:50 16 know that Cambridge or Old Granite has no right to
14:56:55 17 control the activities on the railroad property?

14:56:57 18 A. Sure.

14:57:00 19 Q. And you understand that even your own expert does
14:57:05 20 not claim that there's been any encroachment on
14:57:09 21 Cambridge property on the portion of the property that's
14:57:14 22 further away from Bates Road; in other words, Lots 9,
14:57:18 23 10, 11?

14:57:19 24 A. Right.

14:57:21 25 Q. So since nothing was cleared from Cambridge,

14:57:26 1 whatever was cleared was railroad property, at least in
14:57:30 2 that area --

14:57:30 3 A. I don't agree.

14:57:31 4 Q. You disagree with your own expert on that point
14:57:35 5 too?

14:57:35 6 A. Yes. I'm particularly interested in Lot 9 down
14:57:42 7 in the corner.

14:57:43 8 Q. Well, you know, they came in and did the survey
14:57:46 9 and reached that result.

14:57:49 10 A. I know the surveyors did it, but I walked it.

14:57:53 11 Q. And you know your attorney told the jury that
14:57:55 12 there's no claim for those lots. Do you disagree with
14:58:00 13 him, too?

14:58:01 14 A. Yes.

14:58:17 15 Q. The area the jury walked, and you did too the
14:58:19 16 other day, where that catch basin is, the lot 15, lot 16
14:58:23 17 border, that's basically the lowest part of your
14:58:26 18 development?

14:58:26 19 A. Right.

14:58:33 20 Q. Let me ask you about, you said you have \$539,000
14:58:38 21 into the spec house?

14:58:39 22 A. Yes.

14:58:40 23 Q. That house is about 2,600, 2,700 square feet?

14:58:47 24 A. It's about 2800.

14:58:50 25 Q. And so it's -- you have something just under \$200

14:58:54 1 a square foot in that house?

14:58:56 2 A. Yes. There's a lot of amenities in that house.
14:59:03 3 One of the things is --

14:59:11 4 Q. Do you remember what you indicated back at the
14:59:14 5 time of deposition that you had into that house?

14:59:16 6 A. No. I think I said 500.

14:59:23 7 Q. Would it surprise you if the answer was that
14:59:27 8 including the interest that you have paid ever since the
14:59:32 9 house was built, and what you have in the house, the
14:59:36 10 grand total is \$395,000? You don't believe you said
14:59:42 11 that?

14:59:43 12 A. No.

14:59:55 13 Q. You had your daughter run the figures, and she
14:59:58 14 came up on the spec house, and the payments on the
15:00:01 15 interest on the loan comes up to \$395,000. Do you see
15:00:06 16 that?

15:00:06 17 A. Yes.

15:00:07 18 Q. Well, who ran the numbers that came up \$150,000
15:00:13 19 more?

15:00:13 20 A. I did.

15:00:21 21 Q. But at least that's what you told me back at the
15:00:23 22 time of the deposition?

15:00:25 23 A. That was September 25, 2007.

15:00:30 24 Q. And you would agree that -- in hindsight, you
15:00:33 25 would agree that maybe the houses and the lots were too

15:00:37 1 expensive for the market in Cambridge?

15:00:41 2 A. From the get-go?

15:00:44 3 Q. Yeah.

15:00:44 4 A. From 2001?

15:00:46 5 Q. Yes. As far as why they stopped selling,
15:00:50 6 perhaps they were too pricey?

15:00:51 7 A. Well, we priced -- no, everybody bought at those
15:00:55 8 prices. We did lower the price for Kevin. Some lots
15:01:03 9 were more desirable. But those prices were set by
15:01:06 10 Betty Lazzaro and our three builders and Tommy and I.
15:01:12 11 And the three builders paid those prices. Now, these
15:01:16 12 guys aren't amateurs. They were the three best
15:01:21 13 builders in Toledo or in northwest Ohio, at least
15:01:26 14 they're considered that by some. I'm sure their
15:01:29 15 competition doesn't think that.

15:01:33 16 Q. Let me see if this refreshes your recollection.
15:01:45 17 Did you tell me one of the problems were the houses were
15:01:47 18 too expensive?

15:01:49 19 A. Yes.

15:01:52 20 Q. Do you stand by that testimony today?

15:01:56 21 A. Yes.

15:02:09 22 MR. BAHRET: I get my exercise in your
15:02:12 23 courtroom, Your Honor.

15:02:16 24 BY MR. BAHRET:

15:02:16 25 Q. Mr. Laskey, I think you already said this. This

15:02:19 1 will be my last area of inquiry. The
15:02:23 2 get-off-the-ground party, or whatever it was that Betty
15:02:26 3 Lazzaro held over at Belmont --

15:02:28 4 A. Uh-huh.

15:02:30 5 Q. Fairly well attended, at least 40 couples were
15:02:34 6 there or something like that?

15:02:35 7 A. Yeah.

15:02:35 8 Q. Not a single sale was generated, though?

15:02:37 9 A. No.

15:02:42 10 Q. I know you have a hearing difficulty. Were you
15:02:45 11 able to hear all my questions, Mr. Laskey?

15:02:46 12 A. Yes.

15:02:48 13 MR. BAHRET: Thank you very much.

15:02:50 14 THE WITNESS: Thank you.

15:02:51 15 THE COURT: Any redirect?

15:02:52 16 MR. ROBON: Yes. Could you give me page
15:02:55 17 67, Mr. Bahret, and 68.

15:02:55 18 - - -

15:02:55 19 JOHN LASKEY, REDIRECT EXAMINATION

15:02:55 20 BY MR. ROBON:

15:04:03 21 Q. From 2001 until the summer, spring of 2006, did
15:04:07 22 you ever have a water problem at the rear of lots 12 to
15:04:13 23 15

15:04:16 24 A. From when?

15:04:18 25 Q. From the time you constructed the subdivision in

15:04:22 1 2001 until the summer of 2006, did you ever have a
15:04:29 2 problem with water, standing water or ponding water --

15:04:32 3 A. No.

15:04:33 4 Q. -- at the rear of those lots?

15:04:34 5 A. No. No.

15:04:35 6 Q. Okay. Now, I know you're a proud man. Would
15:04:40 7 you tell the jury, did you hear -- I know you've got
15:04:45 8 hearing things on now, but when Mr. Bahret took your
15:04:48 9 deposition at my office, some of your answers didn't
15:04:51 10 sound like they were responsive to the questions.

15:04:54 11 MR. BAHRET: Objection.

15:04:56 12 A. Yes.

15:04:59 13 THE COURT: I'm not sure we're going to go
15:05:01 14 down this path. Let me see counsel up here.

15:05:17 15 (Discussion had off the record.)

15:06:27 16 BY MR. ROBON:

15:06:28 17 Q. When Mr. Bahret asked you about you cleared the
15:06:31 18 subdivision --

15:06:31 19 A. Yes.

15:06:32 20 Q. When I was out there with the jury I saw all
15:06:34 21 kinds of trees next to the driveway. What do you mean
15:06:37 22 by clearing? When he refers to clearing, he's talking
15:06:44 23 about leveling everything. What did you mean by
15:06:47 24 clearing?

15:06:48 25 MR. BAHRET: I point out my question was

15:06:50 1 clearing at the back line, too.

15:06:52 2 THE COURT: Let's just make easier,
15:06:56 3 everyone. Can you -- let's just leave with it the last
15:07:01 4 part of the question. What did you mean, Mr. Laskey,
15:07:05 5 or what did you understand clearing to mean? Isn't
15:07:08 6 that the question?

15:07:09 7 MR. ROBON: Yes.

15:07:10 8 A. To me a clearing is -- in a subdivision you want
15:07:16 9 to make it as clean as you possibly can, okay. And by
15:07:20 10 clearing, it could be stones, rocks; it could be tree
15:07:27 11 stumps; it could be anything. But when you do a
15:07:30 12 subdivision, you run a street down there, you usually
15:07:34 13 cut the grass back; you try to keep -- you don't line up
15:07:38 14 the straws up two, three feet, but you want to make it
15:07:43 15 as pleasant and nice as can be. If you go out and look
15:07:46 16 at our subdivision right now, you go out and look at
15:07:49 17 Cambridge, you'll see it's cut back there. Also it was
15:07:52 18 cut around all the front fence so the people can walk
15:07:56 19 around, okay. So you want to get rid of all the debris.
15:08:00 20 The same as cleaning the streets when you're building
15:08:03 21 houses.

15:08:04 22 Q. Well, he used clearing in the sense of cutting
15:08:07 23 down all the trees. That didn't happen, did it?

15:08:10 24 MR. BAHRET: Objection.

15:08:12 25 A. Let me say this one.

15:08:20 1 THE COURT: Well, are we done with clearing,
15:08:22 2 or are we still --

15:08:26 3 MR. ROBON: I asked him clearing, as the
15:08:29 4 definition that Mr. Bahret used of cutting down the
15:08:31 5 trees, never happened?

15:08:32 6 THE COURT: I think it was cutting down all
15:08:34 7 the trees at certain locations.

15:08:37 8 BY MR. ROBON:

15:08:37 9 Q. At the back of the lots.

15:08:39 10 A. No.

15:08:39 11 Q. When the jury was out there and they stood by the
15:08:43 12 catch basin, there were all kinds of trees on the back
15:08:46 13 of lot 16; was there not?

15:08:48 14 A. Yes.

15:08:49 15 Q. They're still there today?

15:08:50 16 A. Yes.

15:09:00 17 Q. Lastly, would you tell the jury why you have not
15:09:03 18 evicted Mike McCarthy?

15:09:06 19 A. What?

15:09:07 20 Q. Why you have not evicted Mike McCarthy from the
15:09:11 21 lot 15 home?

15:09:12 22 A. Because he has three children.

15:09:18 23 MR. ROBON: Nothing further.

15:09:19 24 THE COURT: Anything further?

15:09:20 25 MR. BAHRET: No, Your Honor.

15:09:20 1 THE COURT: You may step down, Mr. Laskey.

15:09:33 2 I understand the plaintiff has another
15:09:34 3 witness who is not available until tomorrow; is that
15:09:38 4 correct?

15:09:38 5 MR. ROBON: That's correct, Your Honor.

15:09:39 6 THE COURT: What we're going to do, ladies
15:09:41 7 and gentlemen, to keep the trial moving, is take the
15:09:43 8 next witness out of order, so to speak, and we'll have
15:09:46 9 the defense call their next witness. This would be a
15:09:49 10 good time maybe to take a short break and get
15:09:52 11 reassembled a bit. I'll have some matters to handle
15:09:56 12 with the lawyers. So let's take a 15-minute break,
15:09:59 13 which puts us at 25 after. Please remember the rules.
15:10:04 14 We're in recess.

15:27:12 15 (Recess taken.)

15:27:21 16 (The witness was sworn by the clerk.)

15:28:32 17 THE COURT: As I indicated just before the
15:28:34 18 break, ladies and gentlemen, we're going a little out of
15:28:36 19 order. We are now going to hear a witness offered by
15:28:39 20 the defendant. You may proceed.

15:28:42 21 MR. BAHRET: Thank you, Your Honor.

15:28:43 22 THE COURT: And the witness has been sworn.

15:28:45 23 - - -

15:28:45 24 PETE FORLETTA, DIRECT EXAMINATION

15:28:45 25 BY MR. BAHRET:

15:28:45 1 Q. Good afternoon. Could you state your full name
15:28:53 2 for the record, please.

15:28:53 3 A. Pete Forletta.

15:28:56 4 Q. Pete, you came over here today and I guess took
15:29:00 5 off work. Where did you take off from work?

15:29:02 6 A. 26 Mile and Gratiot, New Haven.

15:29:07 7 Q. For whom do you work?

15:29:09 8 A. Ric-man Construction.

15:29:10 9 Q. How long have you worked for Ric-man?

15:29:12 10 A. Thirty-six years.

15:29:13 11 Q. What job title?

15:29:14 12 A. I'm a foreman.

15:29:16 13 Q. And were you a foreman on the project involving
15:29:20 14 the City of Toledo water main?

15:29:22 15 A. Yes.

15:29:22 16 Q. And did that include -- I think it's called
15:29:25 17 contract E, the area that was between Bates Road and
15:29:30 18 Ford Road?

15:29:30 19 A. Yes.

15:29:31 20 Q. Are you generally familiar with the events
15:29:34 21 surrounding that work?

15:29:35 22 A. Yes.

15:29:35 23 Q. Mr. Forletta, I want to ask you about a pipe that
15:29:42 24 went under the abandoned railroad right-of-way. Are
15:29:47 25 you familiar with that issue?

15:29:48 1 A. Yes.

15:29:49 2 Q. And you're familiar with a manhole cover there?

15:29:53 3 A. Yeah, it was like a catch basin on the side.

15:29:56 4 Q. How did you first become aware of the issue
15:29:59 5 involving that catch basin off to the side?

15:30:01 6 MR. ROBON: Objection, leading. I take it
15:30:06 7 back. Go ahead.

15:30:08 8 MR. BAHRET: Marv you might recognize --

15:30:13 9 THE COURT: No. No. No.

15:30:14 10 MR. ROBON: I withdraw the objection.

15:30:15 11 BY MR. BAHRET:

15:30:15 12 A. I was told by Dean Walsh that there might be a
15:30:19 13 pipe there, but nobody knew exactly if it was there or
15:30:22 14 not.

15:30:22 15 Q. So ultimately tell us, when did you next become
15:30:25 16 involved with any issue involving this pipe?

15:30:28 17 A. When we were going towards the east, and we kept
15:30:33 18 digging, we ran into it. We finally broke it with an
15:30:38 19 excavator.

15:30:38 20 Q. Now, Mr. Forletta, the work -- the way you're
15:30:43 21 going, you're coming from Ford up to Bates or the other
15:30:47 22 way?

15:30:47 23 A. We're going from White to -- yeah, from White to
15:30:52 24 Bates.

15:30:53 25 Q. And so as you're progressing further, the

15:30:57 1 subdivision would be to your left?

15:30:59 2 A. Yes.

15:30:59 3 Q. All right. And you mentioned an excavator or
15:31:04 4 something is being used?

15:31:05 5 A. Well, you have to dig a hole to set the pipe in.
15:31:09 6 You know what I mean? You have to make, like, a trench
15:31:13 7 so you can put the pipe in.

15:31:14 8 Q. During that process you came into contact with
15:31:18 9 the pipe?

15:31:19 10 A. Yes.

15:31:20 11 Q. Did it break?

15:31:21 12 A. Yeah.

15:31:22 13 Q. You could see in it then?

15:31:23 14 A. You could see both sides of the pipe, yeah.

15:31:27 15 Q. Tell us what you saw when you're looking at that
15:31:30 16 pipe that was now open?

15:31:31 17 A. The pipe was full of dirt; it was solid and dry.

15:31:35 18 Q. So it wasn't moist or muddy; it's dry?

15:31:38 19 A. Dry, yes.

15:31:39 20 Q. Did it look like it had any water in it recently?

15:31:43 21 A. No, it couldn't have. There was no room.

15:31:45 22 Q. It didn't even look like it could pass water?

15:31:49 23 A. No.

15:31:50 24 MR. BAHRET: Thank you. I have no other
15:31:52 25 questions.

15:31:55

1

- - -

15:31:55

2

PETE FORLETTA, CROSS-EXAMINATION

15:31:55

3

BY MR. ROBON:

15:31:55

4

Q. You were the foreman on this job?

15:31:57

5

A. Yes.

15:31:58

6

Q. Can you tell the jury why you didn't stay five or

15:32:00

7

ten feet away from the back of the subdivision when you

15:32:04

8

cut the trees or ordered the trees cut?

15:32:06

9

A. I wasn't there when they cut the trees.

15:32:07

10

Q. You weren't?

15:32:08

11

A. No.

15:32:08

12

Q. You came on afterwards?

15:32:10

13

A. Yes. I came in to do the open cut.

15:32:15

14

Q. Did you see the markings that the City put on the

15:32:21

15

trees or laths showing the property line?

15:32:25

16

A. No.

15:32:25

17

Q. So when you got there, everything was cut down?

15:32:28

18

A. Yes.

15:32:28

19

Q. Would it be your normal procedure as a foreman to

15:32:32

20

stay a few feet, say, away from a chain link fence or

15:32:36

21

from a property line?

15:32:37

22

A. They give us center line station. They put

15:32:41

23

stakes. So we follow their center line.

15:32:44

24

Q. I understand. But my question is, Do you

15:32:47

25

normally, when you're working out in the field and

15:32:49 1 you're up against a subdivision -- let's pretend this
15:32:53 2 jury box is a subdivision. It's got grass growing and
15:32:57 3 trees here. You're working over here where I'm
15:32:59 4 standing. Would you normally stay a few feet away, or
15:33:02 5 would you work right up to the very edge? Yes or no?

15:33:05 6 A. You would stay a few feet -- my guess would be --
15:33:08 7 I don't know. I've got to be in that situation.

15:33:11 8 Q. So you normally do stay a few feet away, correct?

15:33:15 9 A. I guess, yeah. I don't know.

15:33:18 10 Q. Can you tell me why you or the City of Toledo or
15:33:24 11 no one took pictures of this pipe that was supposedly
15:33:28 12 blocked?

15:33:30 13 A. I don't know.

15:33:31 14 Q. Do you have a camera in your truck?

15:33:33 15 A. No.

15:33:36 16 Q. Have you ever taken pictures of a construction
15:33:39 17 site when you think there's a problem?

15:33:40 18 A. Yes, sometimes.

15:33:41 19 Q. It's very common; is it not?

15:33:45 20 A. Usually the -- somebody does it. Somebody takes
15:33:48 21 a picture for our company.

15:33:50 22 Q. Were you in any of the meetings with the City
15:33:52 23 representatives?

15:33:54 24 A. No.

15:33:55 25 Q. You just -- you're the one that was there when it

15:33:57 1 was cut?

15:33:58 2 A. Yes.

15:33:58 3 Q. Did the City authorize you to cut it?

15:34:01 4 A. No. It -- we broke it because we didn't know it
15:34:05 5 was there.

15:34:07 6 Q. Well, that's not what the testimony has been
15:34:09 7 here.

15:34:10 8 MR. BAHRET: Objection.

15:34:12 9 THE COURT: Well, counsel for both sides
15:34:14 10 have a habit of making comments. I'm going to ask you
15:34:17 11 to both refrain from that. Thank you.

15:34:24 12 BY MR. ROBON:

15:34:24 13 Q. Was there a construction superintendent from
15:34:26 14 Ric-man that was higher than you as a foreman?

15:34:29 15 A. Yes.

15:34:29 16 Q. So he may have had meetings that you don't know
15:34:32 17 about?

15:34:32 18 A. Right. I didn't know about any meetings.

15:34:34 19 Q. Let me ask this: Were you surprised when the
15:34:37 20 pipe was cut? Did you know it was there?

15:34:39 21 A. No. I told you, we didn't know it was there.

15:34:41 22 Q. You didn't know it was there?

15:34:43 23 A. No.

15:34:45 24 Q. Could you see the manhole?

15:34:47 25 A. You could see the manhole, but when you looked

15:34:49 1 inside the manhole, you couldn't see anything; it was
15:34:52 2 all full of garbage.

15:34:53 3 Q. Did you see water in the manhole?

15:34:54 4 A. No.

15:34:55 5 Q. Did you drop a light down in the manhole?

15:34:57 6 A. No. It was full of garbage.

15:35:01 7 Q. What kind of garbage?

15:35:02 8 A. I don't know; broken pipe. The manhole was
15:35:06 9 leaning on the side.

15:35:13 10 Q. And you hadn't seen the railroad plans showing
15:35:15 11 the drain pipe?

15:35:17 12 A. No, I didn't have those, no.

15:35:19 13 Q. Were you aware they existed?

15:35:22 14 A. No.

15:35:25 15 Q. So the first time you knew about that was when
15:35:28 16 the excavator took a great big scoop of earth and pulled
15:35:34 17 up the pipe?

15:35:34 18 A. Yes.

15:35:35 19 Q. That's the first time?

15:35:36 20 A. The first time I saw it, yes.

15:35:39 21 Q. How big of a bite -- how many yards does the
15:35:43 22 excavator dig out at one time?

15:35:45 23 A. Five yards, my guess would be.

15:35:48 24 Q. Five yards. And I think we heard yesterday that
15:35:51 25 a tandem truck holds ten yards; about right?

15:35:57 1 A. Something like that.

15:35:58 2 Q. So it would be about half as big as a tandem
15:36:03 3 truck was. One big scoop, then the pipe comes out?

15:36:06 4 A. Well, not really. It depends how deep the pipe
15:36:09 5 was.

15:36:10 6 Q. Well, but it would come out in one big scoop?

15:36:14 7 A. Yeah, it would.

15:36:15 8 Q. Then you're telling the jury that the pipe was
15:36:17 9 plugged with earth?

15:36:19 10 A. Right. Yes.

15:36:20 11 Q. Well, wouldn't the mud that was in the hole
15:36:23 12 through the excavator fill it up?

15:36:27 13 A. No.

15:36:28 14 Q. No?

15:36:29 15 A. No.

15:36:29 16 Q. So it got dug out, broken?

15:36:33 17 A. I'm talking about each edge. Here's where we
15:36:36 18 dug. The trench was in the center. Each edge of the
15:36:39 19 trench, the pipe was still there. You could see it was
15:36:42 20 full of dirt, each side. We dug in the middle.

15:36:45 21 Q. Right. I understand. But weren't you digging
15:36:48 22 down about seven, eight, nine feet, or was it deeper?

15:36:51 23 A. It was deeper than that.

15:36:52 24 Q. It was about 12 or 13 feet, right?

15:36:56 25 A. Probably a little deeper than that.

15:36:58 1 Q. You're telling this jury that when you dug, none
15:37:01 2 of that dirt got in the pipe?

15:37:03 3 A. No.

15:37:04 4 Q. You're not telling them that?

15:37:05 5 A. No, I'm -- I'm telling them that the dirt, it was
15:37:09 6 existing. It was in the pipe.

15:37:10 7 Q. Well, what I'm asking you, sir, is when that
15:37:14 8 giant digger went down there and dug that pipe out,
15:37:17 9 you're telling the jury that a half a truckload of earth
15:37:23 10 is being pulled out and nothing fell into either side of
15:37:26 11 the pipe?

15:37:27 12 A. No, because we clean it with a shovel. If it
15:37:29 13 gets any dirt, we clean it with a shovel, and we look
15:37:32 14 inside. It was packed. Believe me, it was packed.

15:37:35 15 Q. And you don't -- did you report it on your notes?

15:37:40 16 A. I think Dean Walsh did.

15:37:43 17 Q. Did you -- was the City inspector or the City
15:37:48 18 supervisor out there when this happened?

15:37:49 19 A. The City inspector was, yes.

15:37:51 20 Q. Who was that?

15:37:52 21 A. Joe Crandall.

15:37:53 22 Q. And what did he tell you?

15:37:54 23 A. He told me -- he directed us to bulkhead it off
15:37:58 24 on each side.

15:38:00 25 Q. The City did?

15:38:01 1 A. Yes.

15:38:02 2 Q. Did he tell you that those plans had already been
15:38:05 3 premade?

15:38:06 4 A. What?

15:38:08 5 Q. Did he tell you that was a premade decision, or
15:38:11 6 you didn't know?

15:38:12 7 A. I didn't know.

15:38:15 8 Q. And he didn't take a picture either?

15:38:17 9 A. I don't know.

15:38:23 10 Q. Do you recall seeing the railroad fence along the
15:38:28 11 north property line of what you were clearing?

15:38:34 12 A. I don't know what you're talking about.

15:38:38 13 Q. Where the railroad right-of-way ends, did you
15:38:41 14 recall seeing an old railroad fence anyplace between
15:38:45 15 White Road and Bates Road?

15:38:47 16 A. I can't recall that.

15:38:48 17 Q. You don't recall?

15:38:49 18 A. I don't recall that, no.

15:38:50 19 Q. Do you know what a monument is?

15:38:52 20 A. Yeah.

15:38:54 21 Q. Take a look at Exhibit Number 54.

15:39:01 22 THE COURT: It's also on the little screen
15:39:02 23 in front of you, sir.

15:39:03 24 A. Oh, okay.

15:39:05 25 Q. Do you recall ever seeing this monument near the

15:39:07 1 subdivision?

15:39:08 2 A. No.

15:39:10 3 Q. Did you look for any?

15:39:13 4 A. No.

15:39:16 5 MR. ROBON: No further questions.

15:39:18 6 THE COURT: Anything further?

15:39:20 7 MR. BAHRET: No, Your Honor.

15:39:20 8 THE COURT: You may step down. Thank you.

15:39:22 9 You may call your next witness.

15:40:03 10 (The witness was sworn by the clerk.)

15:40:22 11 - - -

15:40:22 12 DEAN WALSH, DIRECT EXAMINATION

15:40:23 13 BY MR. BAHRET:

15:40:23 14 Q. Mr. Walsh, could you state your full name.

15:40:26 15 A. Dean Patrick Walsh.

15:40:29 16 Q. Thank you for coming over here. You know my
15:40:32 17 name is Bob Bahret; I represent the City of Toledo,
15:40:34 18 right?

15:40:34 19 A. Yes.

15:40:35 20 Q. I think you and I met once before?

15:40:37 21 A. Yes.

15:40:37 22 Q. When you were testifying with reference to this
15:40:39 23 case?

15:40:39 24 A. In deposition.

15:40:42 25 Q. I forget where that took place, but you recall

15:40:44 1 the event, anyway?

15:40:46 2 A. Yes.

15:40:46 3 Q. Mr. Walsh, for whom do you work?

15:40:50 4 A. Ric-man Construction.

15:40:51 5 Q. What is your job title?

15:40:54 6 A. General superintendent.

15:40:55 7 Q. How long have you worked for Ric-man?

15:40:57 8 A. Off and on, 30 years.

15:40:59 9 Q. How long have you been the superintendent?

15:41:03 10 A. Eight years.

15:41:05 11 Q. And so back during the -- that particular portion

15:41:09 12 of the Toledo water main project that went behind

15:41:14 13 Cambridge Subdivision, was that under your control?

15:41:16 14 A. Yes, that's my responsibility.

15:41:18 15 Q. Did your company have anything to do with staking

15:41:22 16 the job?

15:41:23 17 A. No.

15:41:24 18 Q. In other words, demarcating the right-of-way?

15:41:27 19 A. No.

15:41:27 20 Q. And did your company physically clear the land?

15:41:32 21 A. No.

15:41:33 22 Q. Who did that?

15:41:35 23 A. Vermillion.

15:41:37 24 Q. And then after the -- after it's staked and you

15:41:43 25 know where the property line is, are there any

15:41:47 1 additional markings put in for Ric-man?

15:41:51 2 A. For clearing or --

15:41:53 3 Q. No, not for clearing, for a center line of any
15:41:56 4 kind.

15:41:57 5 A. After the land is cleared, then the surveyors
15:41:59 6 come back and give us center line stakes and offset
15:42:03 7 stakes for the location of the water main.

15:42:06 8 Q. So those are more woods pounded into the ground
15:42:11 9 down the middle of the right-of-way?

15:42:14 10 A. In the middle then offset.

15:42:16 11 Q. The offset is what? Help me understand.

15:42:19 12 A. It's a stake off of the center because when we're
15:42:22 13 digging through the center, those stakes get destroyed
15:42:24 14 so you need a reference that's offset from the center
15:42:28 15 line in order to delineate where the water main goes.

15:42:30 16 Q. All right. Good enough. The pipe that was
15:42:35 17 being installed, what was that, the dimension?

15:42:38 18 A. It was a 66-inch inside diameter concrete pipe.

15:42:44 19 Q. All right. So basically five and a half foot
15:42:47 20 interior diameter?

15:42:48 21 A. Yes.

15:42:49 22 Q. You were familiar with installing product like
15:42:52 23 that?

15:42:52 24 A. Yes.

15:42:54 25 Q. Ric-man was under a contract with the City?

15:42:58 1 A. Yes.

15:42:59 2 Q. In certain specifications?

15:43:02 3 A. Yes.

15:43:02 4 Q. And you had plans drawn up by Arcadis, a
15:43:06 5 consultant of the City?

15:43:07 6 A. The City had the plans drawn up. That's what we
15:43:10 7 worked by.

15:43:11 8 Q. I meant to say that, but, I mean, you had them
15:43:13 9 available, and they were prepared by Arcadis?

15:43:17 10 A. Yes.

15:43:19 11 Q. And you followed those plans?

15:43:21 12 A. Yes.

15:43:21 13 Q. Tell us about in that area behind Cambridge --
15:43:28 14 well, up over the crossover pipe issue was -- if I say
15:43:32 15 crossover pipe, do you know what I'm talking about?

15:43:35 16 A. Up --

15:43:36 17 Q. The manhole issue.

15:43:37 18 A. Yes.

15:43:37 19 Q. In that area, how deep was the water main pipe
15:43:42 20 buried?

15:43:43 21 A. Roughly eight foot of cover over a six and a half
15:43:48 22 foot pipe, and the thickness of the pipe, so we were
15:43:53 23 probably excavating 15, 16 feet deep, maybe not quite
15:43:58 24 that deep.

15:43:59 25 Q. The contract required a minimum of five feet in,

15:44:02 1 right?

15:44:02 2 A. Yes.

15:44:03 3 Q. Five feet deep?

15:44:04 4 A. Yes.

15:44:04 5 Q. Why were you deeper in that area than the five
15:44:07 6 feet?

15:44:07 7 A. We were on our way to getting to a valve chamber,
15:44:15 8 which required the pipe to be a little bit deeper for
15:44:18 9 the construction of the chamber.

15:44:22 10 Q. Without getting too technical, can you tell the
15:44:25 11 jury what you mean when you're talking about a valve
15:44:28 12 chamber?

15:44:29 13 A. The waterline has to have high points and low
15:44:34 14 points in order to get water out of the system or bleed
15:44:39 15 air out of the system. So we were on a downhill slope
15:44:43 16 towards the valve chamber, and the valve chamber has to
15:44:48 17 be deeper just because of the structure itself needs so
15:44:51 18 much cover and so much room to build it.

15:44:54 19 Q. And so in that area, you're going down for that
15:44:57 20 elevation change you just mentioned?

15:45:00 21 A. Yes.

15:45:01 22 Q. About how much further away was the -- this valve
15:45:06 23 chamber, roughly?

15:45:07 24 A. Approximately 300 feet.

15:45:11 25 Q. How much pipe did that link?

15:45:19 1 A. Boy, I'd have to recall. It was -- I can't
15:45:23 2 remember the exact footage on that job.

15:45:26 3 Q. Can you give a reasonable approximation, or is it
15:45:30 4 just --

15:45:30 5 A. Approximately five miles of pipe.

15:45:33 6 Q. Did your company get any complaints other than
15:45:40 7 behind Cambridge?

15:45:41 8 A. Not that I know of.

15:45:42 9 Q. Were you involved, sir -- let me back up.

15:45:47 10 Tell us about the space. How much land? Was
15:45:50 11 this considered a wide-open work area, a tight job, or
15:45:54 12 what?

15:45:54 13 A. It was wide open in some areas, tight in others.

15:45:58 14 Q. There's been testimony that there was some
15:46:04 15 putting dirt in a ditch then taking dirt out of a ditch
15:46:07 16 at the end of the day. Do you know anything about
15:46:09 17 that?

15:46:09 18 A. There was an existing ditch between the active
15:46:13 19 rail and the abandoned rail, which was where the water
15:46:18 20 main was going. That in order to build the project
15:46:21 21 during the day, that ditch would get filled in during
15:46:26 22 the process of excavating and backfilling the pipe, then
15:46:29 23 at the end of the day it was reopened.

15:46:31 24 Q. And that was in order to give you sufficient room
15:46:35 25 for your equipment and personnel and supplies?

15:46:38 1 A. That's correct.

15:46:39 2 Q. So you needed all the space that was demarcated
15:46:43 3 for you?

15:46:43 4 A. Yes.

15:46:44 5 Q. Okay. Did your crews stay within that space?

15:46:48 6 A. Yes.

15:46:50 7 Q. All right. Tell us about your involvement, if
15:46:55 8 any, with -- I'll call it a crossover pipe. When did
15:46:59 9 you first become aware of the existence or possible
15:47:02 10 existence of a pipe going under the abandoned railway?

15:47:07 11 A. Early in the project when we were awarded the
15:47:10 12 contract, I walked the job and noticed a piece of broken
15:47:18 13 clay pipe and did some investigation trying to figure
15:47:22 14 out what it was because it was not on our blueprints,
15:47:26 15 and brought it to the attention of engineers for the
15:47:30 16 City. And they did some investigation. We didn't know
15:47:35 17 if there was a pipe there. There was nothing except
15:47:38 18 for a broken manhole section. And we didn't know what
15:47:42 19 it was for, if there was going to be some pipe across or
15:47:46 20 not. We knew there might be a possibility of something
15:47:49 21 in the area.

15:47:50 22 Q. Did you try looking in that manhole?

15:47:52 23 A. It was open. The top had been knocked off of it
15:47:56 24 previous before any of our work. And looked down in
15:47:59 25 there, and all you could see was water.

15:48:01 1 Q. Okay. No pipes were visible?

15:48:04 2 A. No.

15:48:05 3 Q. So what was the next involvement or discussion
15:48:08 4 dealing with that manhole or the possibility of any pipe
15:48:12 5 that might be in the way of the job?

15:48:15 6 A. I discussed it with Christy Soncrant and Joe
15:48:22 7 Crandall with the City of Toledo. Then Christy did
15:48:25 8 some investigation on it. Then the next conversation I
15:48:29 9 had was when we had a meeting with John McCarthy, and he
15:48:34 10 had Ray Huber, who is a Wood County engineer, and he was
15:48:39 11 at that meeting, and we asked him if he knew anything
15:48:42 12 about any pipe connected to that manhole. And he gave
15:48:47 13 us a drawing, an old drawing from the railroad showing
15:48:51 14 that pipe going across the abandoned rail section.

15:48:54 15 Q. Was there any discussion about what that pipe
15:48:57 16 did, if it did anything at all?

15:48:59 17 A. We asked him if he knew which way the pipe
15:49:03 18 flowed, if it flowed towards private property or just
15:49:07 19 into the ditch on the railroad property. And he told
15:49:11 20 us that he believed that that pipe drained from the
15:49:14 21 railroad property towards the private property.

15:49:19 22 Q. And did he ever tell you anything different than
15:49:21 23 that?

15:49:21 24 A. No.

15:49:26 25 Q. Was there any water flowing so you could observe

15:49:29 1 what's happening?

15:49:30 2 A. The water in the manhole looked stagnant.

15:49:35 3 Q. Did you look in the ditch between the two
15:49:38 4 railroads to see if there's any evidence of a pipe in
15:49:41 5 that area?

15:49:42 6 A. Yes. We looked around, and we have a tool called
15:49:46 7 a probe rod, which is a narrow rod of steel that you can
15:49:51 8 poke down in the ground, feel anything hard as far as a
15:49:54 9 pipe or anything like that. I poked around in the area
15:49:57 10 across from the manhole and never found anything.

15:49:59 11 Q. So there was no evidence either visually or with
15:50:02 12 your probe of a pipe that actually came out into the
15:50:05 13 ditch?

15:50:06 14 A. That's correct.

15:50:09 15 Q. At any time even after this project did you
15:50:12 16 uncover any evidence of a pipe that actually went into
15:50:15 17 that ditch?

15:50:16 18 A. The crew that installed the water main pipe found
15:50:21 19 a pipe.

15:50:22 20 Q. They found a pipe under the abandoned
15:50:25 21 right-of-way, but did anybody find any part of that pipe
15:50:28 22 that extended into the ditch?

15:50:31 23 MR. ROBON: Objection.

15:50:32 24 A. Can you repeat the question?

15:50:33 25 THE COURT: Overruled. Do you remember the

15:50:35 1 question?

15:50:38 2 THE WITNESS: No. Can you repeat the
15:50:39 3 question?

15:50:39 4 THE COURT: Maybe a bit slower, please.

15:50:42 5 BY MR. BAHRET:

15:50:42 6 Q. Presumably -- well, let me not go there. The
15:50:46 7 assumption is that the pipe may have gone to the
15:50:48 8 manhole; are you with me on that?

15:50:51 9 A. Yes.

15:50:51 10 Q. And there's got to be another end to the pipe?

15:50:54 11 A. Yes.

15:50:55 12 Q. Presumably that would be out in that ditch?

15:50:57 13 A. Yes.

15:50:58 14 Q. Even after the pipe was cut, did anybody ever
15:51:02 15 find a pipe in the ditch?

15:51:04 16 A. No.

15:51:04 17 MR. ROBON: Objection.

15:51:06 18 THE COURT: Overruled.

15:51:12 19 Q. Tell us about what happened when the pipe was
15:51:15 20 encountered and --

15:51:17 21 A. I wasn't on-site that day.

15:51:22 22 Q. Did you learn about the issue?

15:51:24 23 A. Yes.

15:51:24 24 Q. From whom?

15:51:25 25 A. Pete Forletta, our foreman.

15:51:27 1 Q. By what method did you learn?

15:51:29 2 A. Radio, telephone.

15:51:31 3 Q. So you were in immediate contact?

15:51:34 4 A. We were in -- yeah, we had conversations.

15:51:36 5 Q. Did you have any follow-up, like a visit to the
15:51:40 6 site, see the pipe, or anything like that?

15:51:42 7 A. I never saw the pipe when it was exposed.

15:51:47 8 Q. And the information that you were given about the
15:51:49 9 pipe was what?

15:51:51 10 A. That it was full of sediment and debris.

15:51:56 11 MR. ROBON: Objection. It's hearsay, Your
15:52:01 12 Honor.

15:52:01 13 THE COURT: Hearsay. Sustained.

15:52:04 14 Q. What did you do? Whatever the information was,
15:52:07 15 what did your company do based on that?

15:52:09 16 A. Our crew bulkheaded the ends of the pipe on
15:52:14 17 either side of our excavation.

15:52:16 18 Q. What does that terminology mean?

15:52:17 19 A. It -- they put a brick of cement plug on the ends
15:52:25 20 of the pipe on either side of our excavation.

15:52:27 21 Q. Then continued with the installation?

15:52:29 22 A. Yes.

15:52:34 23 Q. Now, after your company was out of that area, and
15:52:37 24 I don't know if you're done with the job, but you're at
15:52:40 25 least out of that immediate area, did you -- let me

15:52:44 1 strike that and start over.

15:52:45 2 At any time after that pipe was encountered did
15:52:48 3 you come to understand that people associated with
15:52:53 4 Cambridge were doing anything with dirt?

15:52:57 5 A. After that pipe was encountered?

15:53:01 6 Q. Actually, I guess that would be before. I
15:53:03 7 misspoke. I'm sorry.

15:53:05 8 At any time after the project was staked, did you
15:53:07 9 become aware of people from Cambridge or associated with
15:53:13 10 Cambridge moving any dirt?

15:53:15 11 A. Yes.

15:53:16 12 Q. And tell us when did you become aware of people
15:53:21 13 other than Ric-man or any other contractor associated
15:53:25 14 with the City of Toledo water project, when did you
15:53:28 15 become aware of other work?

15:53:30 16 A. It was sometime in mid May. I don't know the
15:53:34 17 exact date, but it was the day after we had had a
15:53:37 18 meeting with John McCarthy on the Cambridge property,
15:53:41 19 the day after that there were trucks bringing dirt in
15:53:45 20 through the railroad easement and dumping on the
15:53:48 21 railroad easement and pushing the dirt onto Cambridge
15:53:51 22 property.

15:53:52 23 Q. So the dirt was put on the flat part of the
15:53:55 24 easement and then dozed into Cambridge?

15:53:57 25 A. That's correct.

15:53:58 1 Q. Did they ask you for permission to do that?

15:54:01 2 A. No.

15:54:04 3 Q. And how long, if you know, did that activity go
15:54:07 4 on?

15:54:07 5 A. One day.

15:54:10 6 Q. And what did that do to any -- well, were you
15:54:15 7 aware of a dispute at that point?

15:54:18 8 A. Yes.

15:54:20 9 Q. What did the moving of the dirt do to the
15:54:23 10 evidence of -- that would help resolve that dispute?

15:54:27 11 A. Covered it up.

15:54:29 12 Q. Was there a railroad fence along any part of this
15:54:34 13 job?

15:54:34 14 A. There was remnants of a railroad fence. It
15:54:37 15 wasn't completely intact.

15:54:38 16 Q. Did the remnants of the railroad fence, did that
15:54:41 17 include an area behind Cambridge?

15:54:43 18 A. Yes.

15:54:44 19 Q. And did the moving of all this dirt from the
15:54:49 20 railroad right-of-way, dozing it onto Cambridge
15:54:52 21 property, did that cover or move any part of those
15:54:56 22 remnants?

15:54:56 23 A. Yes.

15:54:58 24 Q. Did it cover or move any vegetation?

15:55:02 25 A. Yes.

15:55:05 1 Q. And then thereafter did you have any further
15:55:10 2 occasions to see Mr. McCarthy? And by this time in the
15:55:15 3 history of the story you knew who he was?

15:55:17 4 A. Yes.

15:55:18 5 Q. Did you thereafter see him on or near the job
15:55:22 6 site that you were on again?

15:55:24 7 A. Yes.

15:55:25 8 MR. ROBON: Objection. Leading every
15:55:29 9 question, Your Honor.

15:55:31 10 MR. BAHRET: Actually, I'm not.

15:55:33 11 THE COURT: No. Overruled.

15:55:36 12 Which Mr. McCarthy; have we identified?

15:55:40 13 BY MR. BAHRET:

15:55:40 14 Q. You said John, right?

15:55:41 15 A. Yes.

15:55:42 16 Q. Tell us about the next encounter with Mr.
15:55:44 17 McCarthy near your job site. What did you see? Was
15:55:49 18 there any interaction, conversation?

15:55:51 19 A. Yes. There was. We had already strung out the
15:55:57 20 pipe for that project along the right-of-way line on CSX
15:56:01 21 property. And the area that he had pushed dirt on
15:56:06 22 before, he had a small excavator in there digging
15:56:13 23 trenches next to our pipe that were stockpiled there.
15:56:17 24 And these a pipe were large diameter. And I was
15:56:20 25 concerned the closeness that he was digging to them that

15:56:23 1 he could cause damage to the pipe or, worse yet, have a
15:56:28 2 pipe roll on top of his work force there because he was
15:56:32 3 digging close to it.

15:56:33 4 Q. Did you express those concerns?

15:56:34 5 A. Yes, I did.

15:56:36 6 Q. And by this time, there was -- what do you call
15:56:40 7 that orange --

15:56:41 8 A. Safety fence.

15:56:43 9 Q. Was there orange safety fence in place?

15:56:46 10 A. Yes.

15:56:46 11 Q. Who put that there?

15:56:47 12 A. We did, Ric-man Construction.

15:56:49 13 Q. And was -- did Mr. Mr. McCarthy do anything with
15:56:53 14 the fence?

15:56:53 15 A. He was moving the fence, and there were some
15:56:56 16 other stakes in the area that he was moving.

15:56:58 17 Q. Tell us about that. What stakes did Mr.
15:57:01 18 McCarthy move?

15:57:01 19 A. The City surveyors had restaked the right-of-way
15:57:04 20 line with a lath along the property of Cambridge and in
15:57:11 21 that area where he had filled. And he was moving those
15:57:15 22 stakes in order to accommodate him digging his trenches.
15:57:19 23 And then he was moving them out of the way, moving our
15:57:24 24 fence out of the way.

15:57:25 25 Q. Okay. Do you know if he put them back?

15:57:28 1 A. He put the stakes back; I don't know --

15:57:33 2 Q. Did he get them in the right spots?

15:57:34 3 A. I couldn't tell you that.

15:57:38 4 Q. You finally completed your project, right?

15:57:41 5 A. Yes.

15:57:41 6 Q. Now, did you have occasion to take photographs
15:57:44 7 out at the job site of any of the activities from Mr.
15:57:49 8 McCarthy?

15:57:49 9 A. Yes.

15:57:52 10 Q. Let me hand you a series of photos. Actually,
15:57:56 11 hopefully these will show up on the monitor right in
15:57:59 12 front of you there, sir. This is Toledo Exhibit A3.
15:58:11 13 Is that a photograph that you took?

15:58:13 14 A. Yes.

15:58:13 15 Q. And tell us briefly what was depicted here. Is
15:58:17 16 that the pipe you were referencing?

15:58:18 17 A. Yes, that's our stockpiled pipe.

15:58:21 18 Q. What's taking place?

15:58:24 19 A. It's the back of John McCarthy walking away from
15:58:29 20 the camera and another gentleman on a small excavator
15:58:34 21 digging a trench.

15:58:37 22 Q. And A2?

15:58:39 23 A. That's a picture of the trench that they were
15:58:42 24 digging.

15:58:47 25 Q. These are obviously not in order, but A11?

15:58:52 1 A. This was long before those last two pictures.
15:58:56 2 This was the pictures of the day in mid May when they
15:59:00 3 were trucking dirt onto CSX property and pushing it onto
15:59:05 4 Cambridge property. That's a picture of the bulldozer
15:59:08 5 pushing dirt onto Cambridge property.

15:59:11 6 Q. That's the actual dozer and the actual operation
15:59:14 7 there?

15:59:14 8 A. Yes.

15:59:17 9 Q. Obviously we're jumping around in time. Sorry
15:59:20 10 for doing that. But A8?

15:59:22 11 A. The picture's not real clear on here. But
15:59:26 12 that's another picture of -- it shows our safety fence
15:59:30 13 still intact in that area. And you really can't see it
15:59:35 14 very well on this, but it shows where he had done some
15:59:39 15 excavation after the pipe was in place.

15:59:43 16 Q. A16?

15:59:45 17 A. Again, pictures of Mr. McCarthy moving the safety
15:59:49 18 fence out of the way, and I don't know who the gentleman
15:59:53 19 is with the camera on his hip, and their excavator there
15:59:57 20 digging next to the pipe.

15:59:58 21 Q. Did Mr. McCarthy replace that fence?

16:00:01 22 A. He did not put it back in place, no.

16:00:04 23 Q. A1. Can you make that one out?

16:00:11 24 A. I can't see the top of the photo.

16:00:13 25 Q. Let me show you the original. For some reason

16:00:16 1 we get a glare on some of these.

16:00:21 2 A. This is just a picture of the pipe in place and
16:00:24 3 the safety fence.

16:00:30 4 Q. Do you know what this is in the middle?

16:00:33 5 A. It's a marker for the right-of-way line. I
16:00:38 6 don't remember whose stake that was because Cambridge
16:00:42 7 had some surveyors out there putting stakes in also.
16:00:45 8 So I'm not sure if that's one that the City put in or
16:00:48 9 one that somebody else put in.

16:00:51 10 Q. A5?

16:00:53 11 A. Just another picture of Mr. McCarthy and their
16:00:57 12 excavator.

16:01:01 13 Q. Did you take this one, A6?

16:01:04 14 A. Yes.

16:01:04 15 Q. What is that, the purpose?

16:01:07 16 A. It doesn't show well on here, but it shows some
16:01:10 17 utilities that had been damaged by their excavation; a
16:01:14 18 phone line, and there was a drain pipe in there.

16:01:18 19 Q. And A7?

16:01:22 20 A. Just another picture of the excavator and its
16:01:26 21 close relationship to the pipe.

16:01:32 22 Q. I'm not sure if this will show it on this screen.

16:01:40 23 THE COURT: This is A17?

16:01:44 24 MR. BAHRET: A17.

16:01:46 25 BY MR. BAHRET:

16:01:46 1 Q. Can you make out whatever this item is in the
16:01:48 2 ditch?

16:01:48 3 A. I can't on this monitor.

16:01:55 4 Q. I don't know if you can make it out on there
16:01:58 5 either.

16:02:02 6 A. It just looks like it might be some type of
16:02:06 7 stump, or it might be one of the timbers that made up
16:02:09 8 the right of way fence.

16:02:12 9 Q. That's what I was wondering.

16:02:18 10 I'm not sure if you took -- let me just hand you
16:02:22 11 these, and tell me which ones, if any -- here's one, A4.
16:02:28 12 That's another one I presume you took?

16:02:29 13 A. Yes.

16:02:30 14 Q. Same idea, just a different view?

16:02:32 15 A. Then on the top of the trench there you can see
16:02:36 16 one of the timbers that was the railroad fence there,
16:02:39 17 the right-of-way fence. They pulled that out, it looks
16:02:42 18 like, and set it on top of the ground.

16:02:46 19 THE COURT: Do you want to point to that,
16:02:51 20 please? Touch your screen.

16:02:54 21 THE WITNESS: Just touch the screen?

16:02:56 22 THE COURT: See what you did.

16:02:57 23 THE WITNESS: Okay.

16:03:01 24 MR. BAHRET: I've known how to do that all
16:03:03 25 along.

16:03:06 1 BY MR. BAHRET:

16:03:06 2 Q. Is this a picture you took, sir?

16:03:09 3 A. Yes.

16:03:10 4 Q. What is that?

16:03:10 5 That's A10 for the record, Your Honor.

16:03:12 6 A. That's the day in mid May where they were
16:03:15 7 trucking dirt on there. That's a picture taken from
16:03:20 8 Bates Road, our access into the site, and one of the
16:03:23 9 trucks that was dumping dirt for Cambridge coming off
16:03:26 10 the site.

16:03:27 11 Q. And what type of trucks were they?

16:03:29 12 A. Tandem and tri-axle dump trucks.

16:03:32 13 Q. And do you happen to know how much dirt one could
16:03:35 14 fit into a tandem and tri-axle dump truck?

16:03:40 15 A. Anywhere between 15 and 20 yards. Depends on
16:03:44 16 the size of the box.

16:03:45 17 Q. Were these dump trucks that were arriving full?

16:03:49 18 A. Yes. The picture depicts it coming out empty.

16:03:58 19 Q. Let me show you these. Were these yours or
16:04:01 20 somebody else's?

16:04:09 21 A. These are all mine.

16:04:11 22 Q. Let's see what we've got here then. A13?

16:04:23 23 A. This picture was taken after our very first
16:04:27 24 meeting with Mr. McCarthy showing the right-of-way fence
16:04:34 25 and part of our clearing, the broken branches are part

16:04:38 1 of what we cleared -- or what our subcontractor cleared.

16:04:42 2 Q. Vermillion?

16:04:43 3 A. Yes.

16:04:43 4 Q. The fence remnants or whatever you want to call
16:04:47 5 it, they're still there?

16:04:48 6 A. Yes.

16:04:49 7 Q. And to orient us, sir, which -- looking at this
16:04:55 8 picture and this orientation, is this the railroad area
16:04:59 9 over here, and this is Cambridge, or vice versa, or
16:05:03 10 what?

16:05:04 11 A. You're correct; to the left of the photo, where
16:05:07 12 your pen is right now, that's railroad property. And
16:05:11 13 the other property is private property.

16:05:13 14 Q. And is this -- when you called it remnants, is
16:05:17 15 this basically representative of what --

16:05:21 16 A. Yes. There were posts like that. Some places
16:05:24 17 it was wired; some places there was posts missing.

16:05:27 18 Q. And let's see. On this one, A14, it's a picture
16:05:33 19 you took?

16:05:33 20 A. Yes.

16:05:38 21 Q. In any event, is this remnants of the fence in
16:05:43 22 here?

16:05:43 23 A. That's correct.

16:05:44 24 Q. Do you know what this is?

16:05:45 25 A. That's a survey stake. I don't recall whose

16:05:50 1 that was, if it was City of Toledo's. It doesn't look
16:05:54 2 like City of Toledo's because it's got a nail in the top
16:05:58 3 of it. I don't recall seeing any from the City with
16:06:01 4 nails on top.

16:06:02 5 Q. A15; is that a picture you took?

16:06:05 6 A. Yeah. That's some type of marker that somebody
16:06:09 7 put there. I don't know who put it there.

16:06:30 8 THE COURT: Off the record.

16:06:32 9 (Discussion had off the record.)

16:06:32 10 Q. And the last one here, sir, A9, are you able to
16:06:36 11 see what that depicts if I move it down a little bit
16:06:39 12 here? Do you see what that is?

16:06:44 13 A. Yes. That's a picture of the manhole that I
16:06:46 14 found. To the right there, the shiny piece of pipe is
16:06:53 15 where somebody had knocked it off. And it's hard to
16:06:58 16 see, but deep in the picture you can see the old manhole
16:07:02 17 cover, an iron manhole cover. That's the way I found
16:07:06 18 that existing manhole when I was walking the job.

16:07:09 19 Q. This is the manhole cover?

16:07:10 20 A. That's correct.

16:07:11 21 Q. Is that on the manhole?

16:07:12 22 A. No, it's laying alongside. The actual manhole,
16:07:15 23 you can't see it. It's to the left of the manhole
16:07:19 24 cover.

16:07:20 25 Q. It's over here somewhere?

16:07:25 1 A. Yes.

16:07:25 2 Q. And then this is --

16:07:27 3 A. That's a top section. The manhole was built of
16:07:32 4 vitrified clay pipe standing upright. That's a piece,
16:07:37 5 three-foot piece knocked off. It was laying on the
16:07:40 6 side.

16:07:41 7 Q. Incidentally, sir, the crossover pipe, was that
16:07:44 8 also vitrified clay pipe?

16:07:47 9 A. I don't know. I wasn't there.

16:07:49 10 Q. Do all of these pictures we just went through
16:07:54 11 fairly and accurately depict the conditions that were
16:07:57 12 present when you took these photographs?

16:08:02 13 A. Yes.

16:08:02 14 Q. Nothing was changed in order to take these
16:08:04 15 photographs?

16:08:05 16 A. No.

16:08:07 17 Q. Are you familiar with a pre-construction video
16:08:12 18 that was done on this job?

16:08:14 19 A. Yes.

16:08:15 20 Q. And tell us what the purpose of that and -- well,
16:08:20 21 just start with that. Why did they do a
16:08:23 22 pre-construction video?

16:08:24 23 A. Most contracts require it to see what conditions
16:08:29 24 are before the job is started.

16:08:30 25 Q. And did your company either do a pre-construction

16:08:34 1 video or commission one to be done?

16:08:37 2 A. It was required. We commissioned a company to do
16:08:40 3 it.

16:08:40 4 Q. And then you obviously produced copies of that in
16:08:45 5 discovery?

16:08:46 6 A. I don't know if we produced them or the City did.
16:08:49 7 I'm not sure.

16:08:50 8 Q. Actually, I think it was both. But in any
16:08:53 9 event, do you remember, -there's staging markings or
16:08:57 10 something. If I'm using the wrong terminology, help me.

16:09:01 11 A. Stationing.

16:09:02 12 Q. Do you remember generally the station number for
16:09:05 13 the area that would be behind Cambridge?

16:09:09 14 A. Not exactly.

16:09:11 15 Q. Would you recognize it if you saw it, though?

16:09:13 16 A. Yes.

16:09:20 17 MR. BAHRET: Your Honor, I think I'm going
16:09:21 18 to try to do this. Would you mute the sound?

16:09:26 19 THE COURT: You can watch this video, ladies
16:09:28 20 and gentlemen, on the little screen or the big screen.
16:09:31 21 If it would help, you can even close the curtains
16:09:34 22 behind. But let's see how it looks.

16:09:53 23 MR. BAHRET: Is our wizard here?

16:09:56 24 THE COURT: I thought you were the wizard.

16:09:57 25 MR. BAHRET: Oh, no. Anybody that knows me

16:10:00 1 knows that's not true.

16:10:23 2 THE CLERK: We may need a bigger wizard.

16:10:23 3 (Videotape is played during the following
16:10:23 4 testimony:)

16:11:23 5 BY MR. BAHRET:

16:11:23 6 Q. The lower left-hand, are those the station marks,
16:11:27 7 sir?

16:11:27 8 A. Yes.

16:11:29 9 Q. Let me get up. What I'd like you to do when I
16:11:32 10 get to the right area is describe -- and this is all
16:11:37 11 before any land clearing is done, correct?

16:11:39 12 A. Yes. This is coming off of Bates Road moving
16:11:55 13 towards Cambridge.

16:11:56 14 Q. All right. They're broken up in five. What do
16:12:06 15 those numbers represent between 175 and 180? How much
16:12:11 16 distance is that?

16:12:12 17 A. That's 17,500 feet from the point of beginning.

16:12:20 18 Q. So between 175 and 180, that's 500 feet?

16:12:25 19 A. Yes.

16:12:29 20 THE COURT: I'm going to ask you both to
16:12:31 21 keep your voices up because the microphones are off.

16:12:34 22 THE WITNESS: Okay.

16:12:34 23 THE COURT: Thank you.

16:12:36 24 BY MR. BAHRET:

16:12:36 25 Q. Mr. Walsh, as we get closer to Cambridge, and I

16:12:40 1 know we're still some distance away, what I'd like you
16:12:44 2 to do is describe what we're seeing on the video.

16:12:47 3 A. The track that the videographer is walking on is
16:12:51 4 the abandoned railway, which is approximately the center
16:12:55 5 line of where the water main was to be installed.

16:12:59 6 To the right you can -- well, it just went out of
16:13:02 7 the picture. Well, there was that one big house from
16:13:05 8 the Cambridge subdivision. To the left you can see
16:13:10 9 there was a parked train on the active railway. There
16:13:14 10 it is. That's the house to the -- I guess it would be
16:13:23 11 the northernmost portion of Cambridge.

16:13:26 12 Q. Did you have any trouble seeing that house from
16:13:28 13 the right-of-way before the clearing was done?

16:13:30 14 A. No. You can't see it in there, but between the
16:13:50 15 videographer and the active rail, those -- that's the
16:13:56 16 ditch.

16:13:56 17 Q. The ditch?

16:13:57 18 A. The one we refilled and excavated after.

16:14:02 19 Q. And in the clearing, this vegetation we're seeing
16:14:05 20 down this path, that was removed?

16:14:08 21 A. Pardon me?

16:14:09 22 Q. The vegetation that we're seeing down this path,
16:14:13 23 that's what was removed?

16:14:15 24 A. Yes.

16:14:15 25 Q. And there's the house?

16:14:17 1 A. Yes.

16:14:18 2 Q. That's the existence of what was there between
16:14:21 3 that house and the railroad right-of-way?

16:14:22 4 A. Yes.

16:14:32 5 Q. And in this view, sir, we can see that very
16:14:35 6 clearly there's trees and vegetation even in the ditch
16:14:38 7 and deep into the railroad right-of-way?

16:14:40 8 A. Yes.

16:14:41 9 Q. And those were removed in order to make room for
16:14:44 10 the project?

16:14:44 11 A. That's correct.

16:14:57 12 Q. Do you know what the distance is on that
16:15:00 13 right-of-way, the dimensions?

16:15:03 14 A. No. I can't remember.

16:15:06 15 Q. I mean, it's a lot more than just this path we're
16:15:09 16 walking on?

16:15:10 17 A. Yes. Yes.

16:15:26 18 That tree they're showing there I don't believe
16:15:29 19 is on the right-of-way. I think that tree was on
16:15:31 20 private property, the big one they were just showing
16:15:35 21 there.

16:15:36 22 Q. Do you know if it's still there now?

16:15:39 23 A. I'm not sure. One of them Cambridge cut down
16:15:45 24 themselves. There was another big one in the same area
16:15:48 25 that was all rotten and fell down.

16:15:50 1 Q. And do you happen to know why the tree was all
16:15:53 2 rotten?

16:15:53 3 A. No.

16:15:54 4 Q. And when you say Cambridge cut down a tree
16:15:57 5 themselves, what's your source of information on that?

16:16:00 6 A. The day we had our meeting, first meeting with
16:16:03 7 Mr. McCarthy, he had some young gentleman in there
16:16:06 8 cutting it up.

16:16:10 9 Q. Okay. And this first meeting took place in May?

16:16:15 10 A. Mid May. May 14 seems to stick in my brain
16:16:21 11 here.

16:16:23 12 Q. Is this still Cambridge here?

16:16:27 13 A. I believe so, yes.

16:16:28 14 Q. And here you see some fill dirt down there on
16:16:31 15 these other lots?

16:16:32 16 A. Yes.

16:16:34 17 Q. That was there before any water main project was
16:16:36 18 started, right?

16:16:37 19 A. Yes. This is all before we did anything more
16:16:41 20 than drive a pickup down this path.

16:16:49 21 Q. Now, down -- if the guy taking this will turn.

16:16:55 22 A. That's a picture of some utilities on Cambridge
16:16:59 23 property; phone and -- I believe it's a phone and
16:17:01 24 electrical box.

16:17:04 25 Q. And that's towards the back of the Cambridge

16:17:06 1 property?

16:17:06 2 A. Yeah. At the bottom of that just underneath
16:17:09 3 that was one of the fence posts from the right-of-way
16:17:14 4 markings laid down there.

16:17:16 5 Q. Down here we see the trees are taller and they go
16:17:20 6 in deeper to the right. Do you see that? Is that
16:17:24 7 Cambridge or past Cambridge?

16:17:26 8 A. I can't see what you're talking about. To the
16:17:29 9 right, farther down the line?

16:17:31 10 Q. Yeah. Nobody can see it now. Hang on. Maybe
16:17:35 11 it will get back there.

16:17:42 12 Here you go, to the right. Do you see on the
16:17:44 13 right side of the screen you can still see the clearing
16:17:48 14 that's that fill dirt, then there's trees behind it?

16:17:51 15 A. Yes.

16:17:52 16 Q. We're coming up on an area where the trees next
16:17:55 17 to the right-of-way seem to be taller. Do you know what
16:17:58 18 that area is?

16:17:59 19 A. I'm not sure where the Cambridge property line
16:18:02 20 was, but I believe that's a property to the south of
16:18:09 21 Cambridge.

16:18:09 22 Q. A neighbor, whoever that is?

16:18:11 23 A. Yes.

16:18:15 24 Q. Are we basically in this video at the end of
16:18:20 25 Cambridge, sir?

16:18:21 1 A. We're starting to leave, yes. You can still see
16:18:24 2 some of the clearing on the right and some of the spoils
16:18:28 3 that had been dumped there.

16:18:34 4 Q. Now, there's a ditch along part of Cambridge; is
16:18:38 5 there not?

16:18:39 6 A. Yes.

16:18:40 7 Q. Right there to the right of that screen there's a
16:18:43 8 ditch?

16:18:43 9 A. Yeah, there was a ditch all along there. It was
16:18:47 10 a lower area.

16:18:53 11 Q. The pipe was installed not in or through that
16:18:56 12 ditch, though; is that correct?

16:18:58 13 A. No, not that I know of.

16:19:00 14 Q. You stayed to the -- I don't know what compass
16:19:03 15 direction?

16:19:04 16 A. Our water pipeline?

16:19:05 17 Q. Yes.

16:19:05 18 A. Our water pipeline is right about where this
16:19:08 19 videographer is walking. This is the center of the
16:19:11 20 abandoned rail bed. That's virtually where the center
16:19:14 21 of our pipeline was.

16:19:16 22 Q. So oriented just like this videographer was,
16:19:21 23 walking from Bates down to Ford, which, by the way, is
16:19:24 24 the opposite way the pipe was installed, correct?

16:19:26 25 A. That's correct.

16:19:27 1 Q. But oriented as he's walking, the ditch would be
16:19:30 2 to the right? You didn't install anything in the ditch?

16:19:33 3 A. No.

16:20:02 4 (Videotape is stopped.)

16:20:11 5 Q. Mr. Walsh, you obviously were aware of this
16:20:15 6 trespass claim?

16:20:16 7 A. Yes.

16:20:17 8 Q. And did you personally observe the area, look
16:20:20 9 around and try to determine if any mistakes had been
16:20:23 10 made?

16:20:23 11 A. Yes.

16:20:24 12 Q. Did you find any evidence of any trespass by
16:20:27 13 either your subcontractor, your company, or the City of
16:20:30 14 Toledo?

16:20:31 15 MR. ROBON: Objection.

16:20:32 16 A. No.

16:20:33 17 MR. BAHRET: Thank you. I don't have any
16:20:34 18 other questions.

16:20:35 19 THE COURT: Well, the objection is
16:20:37 20 overruled. The answer may stand. And you may cross.

16:20:40 21 MR. ROBON: Thank you, Your Honor.

16:20:43 22 - - -

16:20:43 23 DEAN WALSH, CROSS-EXAMINATION

16:20:44 24 BY MR. ROBON:

16:20:44 25 Q. Mr. Walsh, isn't it true that the voice on that

16:20:48 1 video -- you didn't take that video, did you?

16:20:50 2 A. No, I did not.

16:20:51 3 Q. That was taken by a company that takes
16:20:53 4 pre-construction videos, correct?

16:20:55 5 A. Yes.

16:20:56 6 Q. And you've seen that video in the past?

16:20:58 7 A. Yes.

16:20:59 8 Q. And doesn't the person who is taking that video
16:21:03 9 seem surprised when they saw the house off to the right,
16:21:08 10 which would be on lot 15? They said, here's a house
16:21:11 11 that's not on any of the construction plans?

16:21:15 12 A. I don't recall his voice.

16:21:16 13 Q. You don't deny that?

16:21:18 14 A. I don't deny it.

16:21:20 15 Q. Could you tell the jury, were you the
16:21:25 16 superintendent before the clearing took place, or did
16:21:28 17 you come on-site after the clearing took place?

16:21:30 18 A. Before.

16:21:32 19 Q. Tell the jury the brush and trees and brambles
16:21:36 20 that we saw on the right side that were just past the
16:21:39 21 house, how many feet high would you say those things
16:21:43 22 were?

16:21:44 23 A. I couldn't tell. They weren't very high. That
16:21:49 24 was in the early spring of the year.

16:21:51 25 Q. There were no leaves?

16:21:52 1 A. Not many leaves; they were budding.

16:21:55 2 Q. Tell the jury, the tallest tree that was cut down
16:21:58 3 was what, 75 feet tall?

16:22:00 4 A. On the entire job?

16:22:02 5 Q. Well, between those two roads, Bates Road and
16:22:06 6 White or Ford Road?

16:22:08 7 MR. BAHRET: I'm going to object. It's not
16:22:10 8 relevant unless we're behind Cambridge.

16:22:13 9 THE COURT: Was your question a general
16:22:14 10 question, any tree, whether -- no matter whose property
16:22:19 11 it was?

16:22:20 12 MR. ROBON: Any tree, to get an idea of the
16:22:24 13 different elevations of the trees.

16:22:25 14 A. Can you restate the question?

16:22:27 15 Q. What was the highest tree -- was it 75 feet --
16:22:30 16 that was cut down by Vermillion?

16:22:32 17 A. I don't know.

16:22:34 18 Q. Did you walk this site prior to having Vermillion
16:22:40 19 clear all the trees?

16:22:41 20 A. Yes.

16:22:43 21 Q. Can you tell me why there was no safety fence
16:22:47 22 installed by you or Vermillion before they came out
16:22:51 23 there with those giant machines throwing things?

16:22:54 24 MR. BAHRET: Objection.

16:22:55 25 Q. Cutting things.

16:22:56 1 THE COURT: Overruled.

16:22:59 2 A. Say again, please.

16:23:00 3 Q. Why was there no orange or yellow safety fence
16:23:05 4 installed along what you thought the right-of-way was
16:23:10 5 before any tree cutting took place?

16:23:13 6 A. You could not install a fence because of all the
16:23:17 7 brambles and such.

16:23:19 8 Q. In other words, the brambles were so thick that
16:23:22 9 you couldn't really walk through it, correct?

16:23:24 10 A. You couldn't place a fence through it.

16:23:27 11 Q. Right. It would be impossible to walk through
16:23:30 12 it. If that path wasn't there, you wouldn't have been
16:23:32 13 able to go down that right of way, correct?

16:23:35 14 A. I don't agree with that.

16:23:39 15 Q. Well, how high is the fence?

16:23:42 16 A. The safety fence?

16:23:43 17 Q. Yeah. It's about three feet?

16:23:45 18 A. It's four feet.

16:23:46 19 Q. Four feet. And you agree that there was no
16:23:49 20 safety fence installed before any construction took
16:23:54 21 place with regard to the tree removal?

16:23:56 22 A. That's correct.

16:23:58 23 Q. Okay. Now, you took all these pictures. Can you
16:24:02 24 tell me why there's no picture of the pipe that was
16:24:04 25 severed?

16:24:06 1 A. I wasn't on-site that day.

16:24:08 2 Q. You didn't instruct your foreman to take a
16:24:11 3 picture?

16:24:11 4 A. No.

16:24:12 5 Q. You knew that pipe was in there, correct, because
16:24:15 6 it was discussed beforehand?

16:24:18 7 A. We were aware there was a --

16:24:19 8 Q. Yes or no?

16:24:20 9 A. -- a possibility of pipe being there.

16:24:27 10 Q. Can you tell the jury, what would have been the
16:24:30 11 cost to dig that trench, let's say, three, four feet
16:24:34 12 deeper and reinstall that pipe?

16:24:36 13 A. I don't know.

16:24:37 14 Q. Would you say it would be less than \$1,000?

16:24:40 15 A. I don't know.

16:24:41 16 Q. Give me an estimate, sir. You're a construction
16:24:44 17 superintendent. How many hours would it take? What do
16:24:47 18 you charge per hour?

16:24:50 19 A. I'm in charge of day-to-day activities. I do
16:24:55 20 not get involved in pricing.

16:24:57 21 Q. Well, let me ask this question: The gentleman
16:25:01 22 that was just here talked about a giant digger that took
16:25:05 23 five cubic yards in one scoop. Was that what was used
16:25:11 24 on this particular job site?

16:25:12 25 A. Yes.

16:25:13 1 Q. And would you tell the jury, five cubic yards, a
16:25:18 2 cubic yard is 27 square feet?

16:25:22 3 A. Cubic feet. 27 cubic feet.

16:25:25 4 Q. And one cubic yard stands three feet high, right?

16:25:30 5 A. Yes.

16:25:31 6 Q. So how big, how deep of a hole does one scope
16:25:36 7 make?

16:25:36 8 A. Depends on how long the scoop --

16:25:39 9 Q. Well, the scoop that was on the construction
16:25:42 10 site.

16:25:44 11 A. I don't understand the question.

16:25:46 12 Q. My question is, how deep of a hole with just one
16:25:50 13 scoop, how deep of a hole would be made to put those
16:25:54 14 tiles in?

16:25:54 15 A. It depends on how long the scoop is made. You
16:25:58 16 can make a scoop one foot long; you can make a scoop 20
16:26:04 17 feet long.

16:26:05 18 Q. How deep could it go from one scoop? From what
16:26:08 19 to what? One foot to ten foot?

16:26:12 20 A. Average would probably be a couple of feet.

16:26:15 21 Q. So how long does it take to take one scoop, pick
16:26:20 22 it up and lay it on the side or put it in a truck? A
16:26:24 23 couple minutes?

16:26:26 24 A. Four or five seconds.

16:26:28 25 Q. And would you agree with me that they could

16:26:30 1 probably dig another four feet in a matter of less than
16:26:35 2 five minutes?

16:26:37 3 A. Yes.

16:26:39 4 Q. And would you agree with me that the trench was
16:26:43 5 what, five feet, six feet wide? How wide was it?

16:26:46 6 A. The trench was probably 15, 17 feet wide at the
16:26:50 7 top.

16:26:51 8 Q. Can you tell the jury what a PVC pipe would cost,
16:26:56 9 two feet in diameter, 20 feet long?

16:26:58 10 A. I don't know.

16:26:59 11 Q. Would you say you could probably buy it for 300
16:27:01 12 or 400 bucks?

16:27:02 13 A. I don't know.

16:27:03 14 Q. You have no idea?

16:27:04 15 A. No.

16:27:21 16 Q. I'm looking at the contract Ric-man had with the
16:27:26 17 City of Toledo. Did you ever read it?

16:27:32 18 This is Exhibit 97, Your Honor. Page SP 87.

16:27:45 19 My question was, Did you ever read it?

16:27:46 20 A. Yes.

16:27:50 21 Q. Did you read this part that says at the very top
16:27:53 22 under Section 1.1, replace -- "A section includes
16:27:59 23 replacement of existing sewers and drains which must be
16:28:03 24 removed or are damaged during trenching or other
16:28:07 25 operations and not noted to be removed or abandoned."

16:28:13 1 Isn't that the situation with regard to this
16:28:16 2 24-inch drain pipe?

16:28:29 3 A. That's a section in the specs that includes that
16:28:36 4 operation.

16:28:36 5 Q. And the drain pipe was described just like this.
16:28:40 6 It was not noted to be removed or abandoned because it
16:28:44 7 wasn't shown in the City plans, right?

16:28:47 8 A. It was not shown on the City plans.

16:28:48 9 Q. And the contract covers it, that you would cover
16:28:51 10 replacement of those kinds of things?

16:28:53 11 A. If directed to.

16:29:08 12 Q. Would you take a look at Exhibit 54. Do you see
16:29:15 13 the monument where the stake is?

16:29:20 14 A. Yes.

16:29:20 15 Q. Did you ever see that concrete monument at the
16:29:23 16 Cambridge site?

16:29:24 17 A. Yes.

16:29:25 18 Q. You did?

16:29:27 19 A. I took that picture.

16:29:28 20 Q. You took this picture?

16:29:29 21 A. I took a picture just like it.

16:29:31 22 Q. Can you look in the back right here, and do you
16:29:36 23 see the old part of the fence right in here?

16:29:41 24 A. It's not real clear on this monitor.

16:29:44 25 Q. Well, let me hand it to you here. Do you see

16:29:52 1 the wire?

16:29:53 2 A. Yes.

16:29:53 3 Q. And the post?

16:29:54 4 A. Yes.

16:29:55 5 Q. Let me point it out for the jury. Or maybe it's
16:30:00 6 not clear for you either.

16:30:02 7 MR. ROBON: Can I show the jury, Your Honor?

16:30:03 8 THE COURT: Sure.

16:30:09 9 MR. ROBON: Here is the wire. Here is the
16:30:12 10 fence post.

16:30:17 11 These are the wires in the back here. This
16:30:20 12 is the fence post. And here's the property line.

16:30:24 13 MR. BAHRET: Your Honor, I object to him
16:30:25 14 saying there's the property line.

16:30:27 15 THE COURT: We'll strike the reference to
16:30:29 16 the property line.

16:30:32 17 MR. ROBON: I meant the surveying monument.

16:30:38 18 BY MR. ROBON:

16:30:38 19 Q. Doesn't that appear to show that the railroad
16:30:40 20 fence was on the Cambridge property?

16:30:45 21 A. I can't determine that. I don't know who put
16:30:49 22 the stake and what reference they used to put the stake.

16:30:51 23 Q. Not the stake. I'm referring to the survey
16:30:54 24 monument?

16:30:55 25 A. Well, that's marking the monument. The stake is

16:30:58 1 marking the monument.

16:30:59 2 Q. But if the monument is correct, it would show the
16:31:03 3 railroad fence was on the property of the Cambridge
16:31:06 4 subdivision?

16:31:08 5 A. Yes, it would, if that is correct.

16:31:11 6 Q. Okay. Can you indicate to the jury, when you do
16:31:23 7 a construction project like this, do you take different
16:31:26 8 precautions when you're next to a subdivision that has
16:31:30 9 houses and kids as opposed to doing something out in the
16:31:34 10 middle of a corn field?

16:31:36 11 A. I don't understand the question.

16:31:38 12 Q. Are there different safety procedures used by
16:31:41 13 your company when you're doing construction or
16:31:46 14 excavation out in an open corn field as opposed to when
16:31:50 15 you're abutting a subdivision?

16:31:53 16 A. No.

16:31:54 17 Q. You use the same things?

16:31:57 18 A. Yes.

16:31:58 19 Q. Can you tell the jury why you didn't -- you knew
16:32:03 20 the subdivision was there, right?

16:32:05 21 A. Yes.

16:32:06 22 Q. Can you tell the jury why you didn't stay three,
16:32:09 23 four, five feet away from what you thought was the
16:32:12 24 property line?

16:32:13 25 A. We're allowed to use -- we're given a certain

16:32:17 1 area to work in, and we need to use all the area.

16:32:22 2 Q. And you didn't think about the impact of cutting
16:32:27 3 the trees, the noise, or anything right up against the
16:32:33 4 subdivision line with that house on lot 15 in Cambridge?

16:32:38 5 A. We were allowed to use --

16:32:40 6 Q. That's not what I asked you, what you're allowed.
16:32:43 7 I asked, Did you think about it? Yes or no?

16:32:46 8 A. Repeat the question, please.

16:32:47 9 Q. Did you think about not cutting all the way up to
16:32:51 10 what you thought the property line was when you were up
16:32:55 11 against the house that you just saw in the Cambridge
16:33:00 12 subdivision?

16:33:01 13 A. No.

16:33:03 14 Q. Did you think about whether or not the view from
16:33:15 15 the rear of the house would be impacted by your cutting
16:33:19 16 right up to the property line?

16:33:20 17 MR. BAHRET: Your Honor, I'm going to
16:33:22 18 object. That's irrelevant. We have the absolute
16:33:24 19 right to remove trees from the railroad property whether
16:33:27 20 it disturbs a view or not.

16:33:30 21 MR. ROBON: He didn't remove it from the
16:33:31 22 railroad. He removed it from the property.

16:33:33 23 MR. BAHRET: Listen to your question, Marv.

16:33:35 24 THE COURT: Gentlemen, comments to me,
16:33:39 25 please. I'll sustain the objection.

16:33:43 1 BY MR. ROBON:

16:33:54 2 Q. When you saw Mr. McCarthy digging, did you know
16:34:13 3 what he was looking for?

16:34:15 4 A. No.

16:34:17 5 Q. Did you ask him?

16:34:20 6 A. No.

16:34:25 7 Q. You have a photograph that you took here, a
16:34:28 8 picture A6; doesn't that show exposure of roots that
16:34:34 9 looks like they just recently have been cut in the
16:34:38 10 bottom of the trench?

16:34:43 11 A. Repeat the question, please.

16:34:44 12 Q. Doesn't that picture, A6, look like in the bottom
16:34:50 13 of the trench that Mr. McCarthy dug that you said he
16:34:53 14 testified to, doesn't that look like roots or stumps
16:34:56 15 that were just cut?

16:34:57 16 A. There's debris in the bottom.

16:35:02 17 Q. Okay. And if I look right here, doesn't that
16:35:05 18 look like a freshly cut piece of wood or brambles?

16:35:09 19 A. It doesn't show well on this monitor. I can't
16:35:11 20 tell. That looks like a skinned-up piece of wood. I
16:35:23 21 can't tell if it's a freshly cut root or not.

16:35:33 22 Q. And that trench was just what, four or five feet
16:35:36 23 away from the big pipe you had on the property?

16:35:39 24 A. I never measured it.

16:35:41 25 Q. Give us -- I'll show you a photograph, and you

16:35:46 1 can tell us. Take a look at Exhibit A4, what appears
16:35:54 2 to be the property line. How close were your pipes,
16:35:57 3 five, six feet?

16:36:01 4 A. Our pipes were probably five feet off, four or
16:36:06 5 five feet off the property line.

16:36:08 6 Q. And it is your testimony, Mr. Walsh, that you
16:36:13 7 assumed the property line was where the railroad fence
16:36:17 8 was?

16:36:17 9 A. Can you repeat the question?

16:36:19 10 Q. You assumed that the property line was where the
16:36:24 11 railroad fence was, correct?

16:36:30 12 A. That's where it was marked.

16:36:32 13 Q. You assumed that was the --

16:36:35 14 A. Yes.

16:36:36 15 Q. Thank you. You had no curiosity of asking Mr.
16:36:43 16 McCarthy why he was digging there?

16:36:49 17 A. This was after Mr. McCarthy had threatened a
16:36:54 18 lawsuit. And if someone threatens a lawsuit, company
16:36:59 19 policy, I'm not allowed to have conversation with him.

16:37:02 20 Q. Take a look at photograph A2 in the bottom here,
16:37:14 21 in the trench. Do you see the exposed stumps?

16:37:18 22 A. I cannot see it well on this monitor.

16:37:36 23 I can see what looks like stumps down at the
16:37:39 24 bottom of the trench

16:37:47 25 MR. ROBON: Can I show this to the jury,

16:37:49 1 Your Honor, since it's not really good on the monitor?

16:37:52 2 THE COURT: You can walk it by, sure.

16:38:24 3 Q. It's your testimony that the City of Toledo
16:38:26 4 authorized the bulkheading of the drainage pipe?

16:38:30 5 A. Yes.

16:38:32 6 Q. And was it Christy Soncrant or Joe Crandall or
16:38:37 7 somebody else?

16:38:37 8 A. Joe Crandall was on-site. I don't know if
16:38:41 9 Christy was on-site that day.

16:38:45 10 Q. But he was authorized on behalf of the City?

16:38:47 11 A. I don't know.

16:38:49 12 Q. Do you agree with me that the construction plans
16:38:52 13 you were given by the City of Toledo did not show the
16:38:54 14 Cambridge subdivision?

16:38:57 15 A. Yes.

16:39:06 16 Q. And you testified that you saw water in the
16:39:09 17 manhole when you looked down it, correct?

16:39:12 18 A. Yes.

16:39:17 19 Q. Mr. Forletta, who was here about an hour ago,
16:39:20 20 testified he saw garbage at the bottom. You don't know
16:39:28 21 which is right? Do you remember seeing the water?

16:39:30 22 A. I know what I saw.

16:39:31 23 Q. Okay. Can you tell me, you've encountered pipes
16:39:36 24 before that have not been shown on plans, correct?

16:39:39 25 A. That's correct.

16:39:40 1 Q. And dye tests are done or other things are done
16:39:44 2 to see where pipes drain to or if they're active,
16:39:48 3 correct?

16:39:49 4 A. They usually do whatever they can to find --
16:39:54 5 there's a lot of different ways to find out if a pipe is
16:39:58 6 active or not.

16:39:59 7 Q. Very inexpensive ways, are they not?

16:40:01 8 A. Yes.

16:40:03 9 Q. Can you tell the jury here, did Ric-man or the
16:40:06 10 City of Toledo take any measures to do any kind of
16:40:11 11 testing on whether that drain pipe worked or not?

16:40:16 12 A. I don't know.

16:41:01 13 Q. Did you, knowing that there was a residence up
16:41:04 14 against the right-of-way for the railroad, did you knock
16:41:08 15 on the door and say, We're going to do construction work
16:41:12 16 out here; keep your children inside, or anything like
16:41:14 17 that?

16:41:15 18 A. No.

16:41:15 19 Q. Do you normally do that?

16:41:18 20 A. If I see children that might come in harm's way.

16:41:42 21 Q. How many dollars do you think the City of Toledo
16:41:44 22 saved or Ric-man saved by not reconnecting that pipe?

16:41:51 23 A. I couldn't tell you.

16:41:53 24 Q. Can you tell this jury if it would have delayed
16:41:56 25 the project more than, let's say, four or five hours to

16:42:00 1 just go buy a pipe?

16:42:04 2 A. Can you state that question again.

16:42:06 3 Q. Yes. Would your project have been delayed by
16:42:09 4 more than four or five hours if you went and bought a
16:42:13 5 pipe and then installed the pipe?

16:42:18 6 A. I don't believe so.

16:42:35 7 MR. ROBON: Nothing further, Your Honor.

16:42:36 8 THE COURT: Any redirect?

16:42:37 9 MR. BAHRET: Just briefly.

16:42:39 10 - - -

16:42:39 11 DEAN WALSH, REDIRECT EXAMINATION

16:42:40 12 BY MR. BAHRET:

16:42:40 13 Q. Mr. Walsh, you're familiar with construction
16:42:44 14 plans in general; are you not?

16:42:46 15 A. Yes.

16:42:46 16 Q. Would it be true to say that it is not uncommon
16:42:49 17 that surrounding structures aren't on the plans?

16:42:53 18 A. Yes.

16:42:54 19 Q. I mean, construction plans don't put every
16:42:58 20 surrounding structure on them?

16:43:00 21 A. That's correct.

16:43:01 22 Q. So the fact that this subdivision wasn't there,
16:43:03 23 was that unusual in any way?

16:43:05 24 A. No.

16:43:06 25 Q. Was it dangerous in any way?

16:43:08 1 A. I don't believe so, no.

16:43:11 2 Q. Did you know the subdivision was there?

16:43:14 3 A. Yes.

16:43:14 4 Q. I'm not sure if the jury got the gist of what you
16:43:17 5 were talking about when you say how big of a scrape you
16:43:20 6 make. Remember the questioning about this scooper?

16:43:22 7 A. Yes.

16:43:23 8 Q. Is that called a bucket?

16:43:24 9 A. Yes.

16:43:25 10 Q. So if the bucket were to enter the ground and
16:43:31 11 just go two inches, then the operator can scrape 20 feet
16:43:36 12 or -- I don't know what the distance of the arm is; he
16:43:38 13 could make a very long but shallow scrape?

16:43:41 14 A. That's correct.

16:43:41 15 Q. That's what you were referring to?

16:43:43 16 A. That's correct.

16:43:44 17 Q. If he went in real deep he, of course, would fill
16:43:48 18 it up with less distance. Either way, he'd have a full
16:43:51 19 bucket?

16:43:52 20 A. That's correct.

16:43:53 21 MR. BAHRET: Okay. Thank you, sir.

16:43:56 22 MR. ROBON: Nothing further.

16:43:58 23 THE COURT: You may step down. Thank you.

16:44:01 24 Is this a breaking point for the day?

16:44:03 25 MR. BAHRET: I have one more witness here in

16:44:06 1 from east Ohio. I'd like to get him in and out of here
16:44:10 2 today if possible. I know, famous last words.

16:44:16 3 THE COURT: Ladies and gentlemen, are you
16:44:18 4 okay if we try to get this witness on and off in the
16:44:21 5 next -- how long do you anticipate your direct will be?

16:44:25 6 MR. BAHRET: I will do everything I can to
16:44:27 7 shorten it up to about ten minutes.

16:44:30 8 THE COURT: So if we end around 5:00 or a
16:44:33 9 little after, are we okay? If not, speak up. You seem
16:44:37 10 reluctant.

16:44:47 11 THE JUROR: Let's do it.

16:44:48 12 THE COURT: I opened windows to try to get
16:44:50 13 some breeze. I apologize.

16:44:51 14 Sir, if you come up front, our deputy clerk
16:44:53 15 will swear you in, please.

16:45:43 16 (Discussion had off the record.)

16:46:31 17 (The witness was sworn by the clerk.)

16:46:43 18 THE COURT: Have a seat behind you. If you
16:46:46 19 need that to hear, I'm going to ask counsel for both
16:46:48 20 sides to please use your microphone.

16:46:55 21 MR. BAHRET: You don't have to use that.
16:46:56 22 It's an amplifier.

16:47:01 23 - - -

16:47:01 24 CARL KOPOCS, DIRECT EXAMINATION

16:47:02 25 BY MR. BAHRET:

16:47:02 1 Q. Would state your full name for the jury.

16:47:04 2 A. Carl Kopocs.

16:47:06 3 Q. Sir, what line of work are you in?

16:47:08 4 A. I'm in the tree service and land clearing
16:47:10 5 business.

16:47:10 6 Q. What's the name of the company or companies?

16:47:14 7 A. The company we're talking about is Vermillion
16:47:17 8 Tree Service and Land Clearing.

16:47:18 9 Q. And how long have you been in the land clearing
16:47:22 10 and tree service business?

16:47:23 11 A. Forty-four years.

16:47:25 12 Q. Okay. And is it basically a family business?

16:47:28 13 A. Yes.

16:47:29 14 Q. And where is it located?

16:47:31 15 A. Vermillion, Ohio.

16:47:33 16 Q. Which I guess is where it gets its name then?

16:47:36 17 A. Yes.

16:47:36 18 Q. Okay. Did your company have involvement in the
16:47:40 19 Toledo water main project back in 2006?

16:47:44 20 A. Yes, sir.

16:47:45 21 Q. My understanding is you were a subcontractor of
16:47:49 22 Ric-man Construction Company?

16:47:50 23 A. Yes.

16:47:51 24 Q. What was the role of your company?

16:47:52 25 A. They asked us to take the trees out of a

16:47:58 1 designated area, take the stumps out so they could
16:48:02 2 install a water main.

16:48:03 3 Q. And the designated area would be briefly stated
16:48:06 4 as the railroad right-of-way?

16:48:07 5 A. The railroad right-of-way with a fence on one
16:48:09 6 side and -- pretty well 50, 60 feet wide, 100 feet wide.
16:48:14 7 It varied a little bit on one side. The other side was
16:48:18 8 always straight.

16:48:18 9 Q. And was it staked for you?

16:48:21 10 A. Yes.

16:48:22 11 Q. And tell us what the markings looked like.

16:48:25 12 A. They would be a lath; it would be three-eighths
16:48:28 13 thick by about two inches. Typically they're three
16:48:31 14 feet tall, pound them in the ground six, eight inches,
16:48:35 15 and it would say CL on the side of the lath that we
16:48:38 16 would clear on, clearing limits. So we know we'd clear
16:48:42 17 on the side where the writing was.

16:48:45 18 Q. And did -- were there markings other than laths
16:48:48 19 such as ribbons or painting, painted marks or anything
16:48:51 20 like that that you saw?

16:48:52 21 A. I would say it was staked. That's typically --
16:48:56 22 surveyors just stake it.

16:48:57 23 Q. Behind Cambridge was there a railroad fence?

16:49:00 24 A. Yes.

16:49:01 25 Q. Or at least the remnants of a railroad fence.

16:49:04 1 And did you see that?

16:49:06 2 A. I saw that when we looked at it.

16:49:10 3 Q. All right. Now, you know -- your company
16:49:14 4 operates a bunch of equipment, I guess, including the
16:49:17 5 two that were just under discussion in this case, one
16:49:19 6 called a feller buncher and one called a hydro-axe,
16:49:25 7 correct?

16:49:25 8 A. Yes.

16:49:26 9 Q. And were those used in the land clearing on this
16:49:28 10 job?

16:49:29 11 A. Yes.

16:49:29 12 Q. Could you just real briefly, I don't want to get
16:49:32 13 into it, especially in view of the hour, just tell the
16:49:35 14 jury how those machines work?

16:49:36 15 A. A hydro-axe is like a big front-end loader; it's
16:49:40 16 especially made with a mower on the front to mow out the
16:49:44 17 underbrush, like a big lawnmower going through that.

16:49:47 18 Then the feller buncher would take the additional
16:49:50 19 trees; it's an excavator purposely built with a saw so
16:49:54 20 we could saw these trees off, grind them, put them in a
16:49:58 21 pile, take them to the chipper, harvest them, and get
16:50:03 22 them out of there.

16:50:04 23 Q. The feller buncher is the one that makes this
16:50:07 24 pile?

16:50:08 25 A. Yes.

16:50:08 1 Q. Do you know what the biggest tree was that your
16:50:10 2 company cut down behind the Cambridge subdivision?

16:50:14 3 A. Probably six inches.

16:50:18 4 Q. And do you have a general idea of the height of
16:50:21 5 that tree?

16:50:22 6 A. 25 to 30 feet.

16:50:27 7 Q. Did you take down any 75-foot trees behind
16:50:31 8 Cambridge, sir?

16:50:32 9 A. No.

16:50:33 10 Q. No three-foot diameter trees?

16:50:35 11 A. No.

16:50:37 12 Q. And you understood at some point, anyway, a
16:50:43 13 property dispute arose?

16:50:45 14 A. Yes.

16:50:46 15 Q. We were all basically told we trespassed, or at
16:50:50 16 least they claim that?

16:50:51 17 A. We heard that, yes.

16:50:52 18 Q. Did you authorize any kind of an undertaking to
16:50:58 19 figure out if any allegation was true?

16:51:02 20 A. Well, I had no other complaints on the property
16:51:06 21 at the time. I mean, all the way down was 16,900 feet,
16:51:13 22 and their only complaint was in that small area.

16:51:13 23 MR. ROBON: Objection.

16:51:16 24 A. My wife had ovarian cancer, and I was helping her
16:51:19 25 with treatments, so that consumed most of my time (there

16:51:22 1 was an objection in middle of the answer.

16:51:24 2 THE COURT: Did we have an objection?

16:51:26 3 MR. ROBON: Yes. We weren't allowed, Your
16:51:28 4 Honor, to talk about other areas, and he's talking about
16:51:32 5 what he did 16,000 feet away.

16:51:39 6 THE COURT: Well, we have gotten from time
16:51:41 7 to time away. I'll let the answer stand.

16:51:43 8 Q. Sir, if I heard what you just said correctly, in
16:51:46 9 this entire length of this project, the only complaint
16:51:49 10 you got was Cambridge?

16:51:51 11 A. Yes, sir.

16:51:52 12 MR. ROBON: Objection.

16:52:04 13 THE COURT: I'll let it stand. Let's move
16:52:06 14 on, please.

16:52:08 15 Q. What did your investigation reveal? Did
16:52:13 16 Vermillion trespass on Cambridge property?

16:52:16 17 A. My investigation found we did not.

16:52:19 18 Q. And were you assisted in that investigation by
16:52:21 19 others?

16:52:23 20 A. I had the foreman and the assistant foreman out.
16:52:26 21 We found the fence on the Cambridge property. We found
16:52:29 22 a tree with fence growing in it. And then the 200-foot
16:52:33 23 problem started, and there was a lot of dirt added.
16:52:35 24 Then you can see where the fence was there again.
16:52:38 25 Somebody had added a whole bench of dirt there from the

16:52:41 1 time we left.

16:52:42 2 Q. To your knowledge did Vermillion stay -- I don't
16:52:48 3 know what's an appropriate distance, a foot away or
16:52:51 4 something of this --

16:52:52 5 A. Typically we stay a foot away because we don't
16:52:55 6 want to get the machinery and grab a wire; it would just
16:52:59 7 destroy the machines.

16:53:01 8 Q. At any point did Vermillion hit the railroad
16:53:04 9 fence or, in your opinion, cross the stakes?

16:53:07 10 A. No.

16:53:09 11 MR. BAHRET: Thank you.

16:53:11 12 THE COURT: You may cross.

16:53:13 13 MR. ROBON: Thank you, Your Honor.

16:53:15 14 CARL KOPOCS, CROSS-EXAMINATION

16:53:16 15 BY MR. ROBON:

16:53:16 16 Q. You're in the business of cutting trees, correct?

16:53:30 17 A. Yes.

16:53:30 18 Q. You don't plant trees?

16:53:32 19 A. We do.

16:53:33 20 Q. Oh, you do. Do you know how valuable some trees
16:53:38 21 can be in the front yard for shade, things like that?

16:53:42 22 A. Yes.

16:53:44 23 Q. What would be the most expensive tree you think
16:53:47 24 you've ever seen?

16:53:49 25 MR. BAHRET: Objection.

16:53:51 1 THE COURT: Overruled. You can answer.

16:53:56 2 A. What do you mean? I don't understand your
16:53:59 3 question.

16:54:00 4 Q. I want to know what you think the most expensive
16:54:03 5 tree to replace that you've ever seen. Maybe a 50-foot
16:54:08 6 tall blue spruce? Would you have any idea what
16:54:12 7 something like that would be worth in somebody's front
16:54:14 8 yard?

16:54:14 9 A. There's a formula for that. It depends on the
16:54:17 10 species of tree, the condition of the tree to the
16:54:21 11 location of that tree. That would give you a price on
16:54:23 12 it. It could be \$20; it could be \$10,000 or \$20,000.

16:54:27 13 Q. Right. Thank you.

16:54:28 14 A. It just depends where it's at.

16:54:30 15 Q. Thank you. I'm going to hand you what we've
16:54:33 16 marked as Exhibit 93.

16:54:42 17 MR. ROBON: Can I approach the witness, Your
16:54:44 18 Honor?

16:54:44 19 THE COURT: Sure.

16:54:46 20 Q. My question is, is this the type of remnants that
16:54:49 21 are left by the hydro-axe that you used at the Cambridge
16:54:54 22 subdivision? When I say remnants, I mean the stumps.

16:55:02 23 A. I would say yes.

16:55:05 24 Q. Okay. And in this photograph, Exhibit 93,
16:55:16 25 doesn't it appear that those stumps are within six or

16:55:18 1 eight inches of the railroad fence, and they are cut
16:55:22 2 down?

16:55:24 3 A. No, they're about three foot away from the fence.
16:55:28 4 The railroad tie, this vertical one is a six by eight,
16:55:33 5 and these are about ten or 12 inches at the cut, so
16:55:36 6 there's got to be about two and a half, three feet
16:55:39 7 there.

16:55:40 8 Q. What about this one over here?

16:55:41 9 A. Same thing.

16:55:42 10 Q. You think they're three feet away?

16:55:48 11 MR. ROBON: Your Honor, may I show this to
16:55:49 12 the jury.

16:55:50 13 THE COURT: Try the screen. Let's see if
16:55:52 14 the screen works.

16:55:54 15 MR. ROBON: I tried. There's an awful lot
16:55:56 16 of glare because the picture is very white. Maybe if I
16:56:03 17 darken this.

16:56:11 18 MR. BAHRET: You made it brighter.

16:56:16 19 MR. ROBON: I'd like to show it to the jury.

16:56:18 20 THE COURT: Go ahead. Just walk it along
16:56:20 21 with no comment, please.

16:56:46 22 BY MR. ROBON:

16:56:46 23 Q. So you're telling this jury that any of these
16:56:49 24 stumps that you cut were at least three feet away from
16:56:51 25 the railroad post in your opinion?

16:56:58 1 A. Well, that particular photo wasn't right there at
16:57:01 2 the Cambridge property. That was somewhere else.

16:57:06 3 Q. How do you know?

16:57:07 4 A. Because I was out there and looked at it here a
16:57:09 5 couple months ago. There's no railroad posts left
16:57:13 6 there.

16:57:15 7 Q. I understand that. But you told the jury that
16:57:17 8 you saw a bunch of fill brought in.

16:57:19 9 A. Yeah.

16:57:20 10 Q. Wasn't the fill covering up some of these stumps?

16:57:26 11 A. That, I don't know. Because I don't know where
16:57:30 12 that was taken. That could have been somewhere else.

16:57:33 13 Q. The testimony, Mr. McCarthy said he took it. Do
16:57:37 14 you know who Mr. McCarthy is?

16:57:39 15 A. No.

16:57:41 16 Q. I want you to take a look at Exhibit Number 18.
16:57:46 17 Does this look like the type of brambles that were along
16:57:50 18 the back of the Cambridge subdivision that you cut?

16:57:53 19 A. Yes.

16:57:58 20 Q. And I'm going to hand you Exhibit 19. The same
16:58:03 21 thing, the thickness, like the brambles that were behind
16:58:10 22 Cambridge?

16:58:10 23 A. On the railroad property?

16:58:12 24 Q. Brambles behind Cambridge. Let's don't discuss
16:58:16 25 whether it was or was not on railroad property.

16:58:18 1 MR. BAHRET: Objection.

16:58:20 2 A. I cut brush like that on railroad property.

16:58:23 3 Q. My question to you is: When you see these stems,
16:58:28 4 like, here or here, can you tell the jury roughly how --
16:58:34 5 what's the diameter straight across? Is it an inch,
16:58:38 6 two inches?

16:58:39 7 A. Three quarter to an inch and a quarter.

16:58:46 8 Q. I'm going to hand you Exhibit A13. I guess I
16:58:53 9 can hand it up here. This was taken by a gentleman
16:59:00 10 from Ric-man. Those are the stumps that your machines
16:59:04 11 cut right up against the railroad fence?

16:59:11 12 A. I'd probably say yes.

16:59:13 13 Q. How close do those stumps look like they are to
16:59:16 14 the railroad fence or the railroad post?

16:59:19 15 A. They're probably six, eight inches, ten.

16:59:23 16 Q. And you told me you tried to stay three feet
16:59:25 17 away?

16:59:26 18 A. Well, these things were hanging out there. If
16:59:28 19 the operator would come by, it would probably hit their
16:59:32 20 head if they're driving a bulldozer or something. We
16:59:34 21 had to clear them back.

16:59:35 22 Q. That's not my question, sir. You told me five
16:59:39 23 minutes ago that you normally stayed three feet away
16:59:41 24 from a railroad fence because it would damage your
16:59:43 25 machine.

16:59:43 1 A. No, I didn't say that. I said those stumps were
16:59:46 2 three foot away from that fence.

16:59:48 3 Q. So you do cut all the way up to the fence?

16:59:50 4 A. Sometimes.

16:59:51 5 Q. And in this case, on that photograph, you did?

16:59:54 6 A. Yes. It's pretty close to the fence.

17:00:00 7 MR. ROBON: May I show this one to the jury,
17:00:02 8 Your Honor?

17:00:03 9 THE WITNESS: You bet. Oh, I'm sorry.

17:00:08 10 THE COURT: You may have my seat.

17:00:10 11 THE WITNESS: I'm not used to being in
17:00:12 12 court.

17:00:39 13 BY MR. ROBON:

17:00:39 14 Q. Is it safe to say that you treated the railroad
17:00:42 15 fence as the boundary line?

17:00:48 16 A. It was staked. It was about six inches off.

17:00:51 17 Q. My question is, is it safe for this jury to
17:00:54 18 assume that you used the railroad fence as the boundary
17:00:58 19 line, what you should cut up to?

17:01:00 20 A. The stakes were synonymous with the railroad
17:01:03 21 fence.

17:01:03 22 Q. Okay. So the stakes were next to the railroad
17:01:06 23 fence?

17:01:06 24 A. Yes.

17:01:12 25 Q. And can you tell the jury why you didn't install

17:01:22 1 a safety fence along the back of the Cambridge
17:01:26 2 subdivision before you did any cutting?

17:01:30 3 A. We never install a fence like that.

17:01:33 4 Q. You don't?

17:01:33 5 A. It's not an industry standard. I never heard of
17:01:37 6 such a request. How would you do it anyhow with all
17:01:52 7 the brush there?

17:01:55 8 Q. Handing you Exhibit 16, is this the feller
17:01:59 9 buncher that your company used in cutting trees?

17:02:06 10 A. Yes.

17:02:06 11 Q. And you see that big sign on there that says
17:02:10 12 "stay back 300 feet"?

17:02:13 13 A. Yes.

17:02:14 14 Q. And can you tell the jury why that's on there?

17:02:20 15 MR. BAHRET: I'll object to the relevance,
17:02:22 16 Your Honor.

17:02:23 17 THE COURT: You may be right. Let's have
17:02:26 18 the answer. You may answer.

17:02:27 19 A. That's there because it's an industry standard,
17:02:30 20 and most trees are 150 feet tall maximum out in the
17:02:35 21 woods. This is for cutting in the woods. And you're
17:02:38 22 supposed to be two, tree lengths away from a tree. So
17:02:41 23 that's why you would have this 300 feet on there.
17:02:45 24 That's on all forestry equipment, or pretty well all of
17:02:49 25 it.

17:02:50 1 Q. And you didn't stay 300 feet from the house that
17:02:54 2 was on lot 15, did you?

17:02:58 3 A. The people are supposed to stay 300 feet away.

17:03:01 4 Q. No, my question is, sir, did you stay 300 feet
17:03:04 5 away from the house that was on lot 15 in the Cambridge
17:03:09 6 Subdivision, yes or no?

17:03:10 7 A. I don't know. I didn't measure the distance
17:03:12 8 from the railroad fence to the house.

17:03:33 9 MR. ROBON: A couple of my exhibits
17:03:34 10 disappeared.

17:03:39 11 THE COURT: Leaning up against your table is
17:03:41 12 the --

17:03:41 13 MR. ROBON: There it is. I'm sorry.

17:03:44 14 BY MR. ROBON:

17:03:44 15 Q. I'm going to hand you what we've marked as
17:03:47 16 Exhibit Number 8. And can you tell the jury the depth
17:03:54 17 of lot 15, the deepest part?

17:03:57 18 A. From the -- I don't know from where it's 238
17:04:02 19 feet. I don't know if they're measuring from the curb
17:04:04 20 or the center of the road.

17:04:06 21 Q. Would you agree with me if there's a house on the
17:04:08 22 property, the house would be much closer than 300 feet?

17:04:13 23 A. Yeah, but that sign is for people, not for
17:04:17 24 houses, the 300 feet.

17:04:19 25 Q. People live in houses, right?

17:04:20 1 MR. BAHRET: Your Honor, he's arguing now.

17:04:23 2 MR. ROBON: I'm sorry. I'll take that
17:04:25 3 back. I shouldn't do that.

17:04:25 4 BY MR. ROBON:

17:04:31 5 Q. Now you mentioned that on one side you cut a
17:04:34 6 straight line. Which side, the tracks or the other
17:04:42 7 side?

17:04:42 8 A. Where the railroad fence was, that 16,900 feet.

17:04:46 9 MR. BAHRET: Why are you displaying your
17:04:48 10 notes?

17:04:49 11 MR. ROBON: I'm sorry, I didn't mean to.

17:04:52 12 MR. BAHRET: They were interesting, though.

17:04:55 13 MR. ROBON: I'm not used to working with
17:04:57 14 this.

17:04:58 15 BY MR. ROBON:

17:04:59 16 Q. So you cut a straight line on the north side of
17:05:03 17 the right-of-way?

17:05:04 18 A. Yes.

17:05:07 19 Q. Can you tell the jury when you saw the house and
17:05:13 20 the subdivision, and you saw the protection the brush
17:05:17 21 behind it gave from the railroad view, did you ever
17:05:22 22 think about maybe not cutting right up to what you
17:05:28 23 thought was the property line?

17:05:29 24 MR. BAHRET: Objection, Your Honor. It's
17:05:32 25 absolutely irrelevant. We have every right to remove

17:05:35 1 it.

17:05:35 2 THE COURT: I understand. I'll sustain the
17:05:49 3 objection.

17:05:53 4 BY MR. ROBON:

17:05:53 5 Q. Did you think about staying back a few extra feet
17:05:55 6 so the brambles would provide protection for the home on
17:06:00 7 lot 15 in case those big spinning blades hit something?

17:06:03 8 MR. BAHRET: Objection. Same basis.

17:06:06 9 THE COURT: I'll let him answer. Go ahead.

17:06:09 10 A. Okay. The blades have side guards on them, as
17:06:12 11 you can see on the illustration. So everything's
17:06:14 12 contained in this, just like a lawnmower, but this is
17:06:18 13 better than a lawnmower.

17:06:20 14 MR. ROBON: You're not answering my
17:06:21 15 question.

17:06:22 16 THE COURT: Let's let him finish and see if
17:06:24 17 he is.

17:06:25 18 THE WITNESS: Can I finish?

17:06:26 19 THE COURT: Yes.

17:06:27 20 A. So we're running parallel with the fence, and
17:06:28 21 we're having the machine down on the ground, so things
17:06:31 22 are not coming out on the side. And we're on railroad
17:06:37 23 property. We was requested to get as much clearance as
17:06:40 24 possible so that they could install the pipe safely
17:06:44 25 without somebody stumbling or falling on branches. If

17:06:50 1 you ever drive a bulldozer, you certainly don't want to
17:06:53 2 push -- all bulldozers have guards on them, four posts,
17:06:58 3 a canopy. So if you push a branch back, it's going so
17:07:03 4 far; it's going to come back and hit you in the face.

17:07:06 5 Q. Your answer is, no, you didn't think about it?

17:07:09 6 A. Yeah, we thought about it. We thought about
17:07:11 7 doing it the way the owner requested it to be done.

17:07:14 8 Q. My question was: Did you think about staying
17:07:16 9 just a few feet back so the brambles would act as a
17:07:20 10 blockade from anything that might fall or be thrown by
17:07:22 11 your machines towards that house?

17:07:24 12 A. Well, we start at the other side and work our way
17:07:27 13 to the fence, and then the last --

17:07:28 14 Q. You're not answering my question, sir. Did you
17:07:31 15 think about staying a few feet back or leaving a few
17:07:35 16 feet of brambles as a buffer, yes or no?

17:07:38 17 MR. BAHRET: Objection to the relevance,
17:07:39 18 Your Honor.

17:07:41 19 THE COURT: Go ahead. You may answer.

17:07:43 20 A. I said we start away from the --

17:07:46 21 Q. Yes or no?

17:07:47 22 A. I'm going to answer it my way, sir.

17:07:49 23 Q. No, sir, you're going to answer the way the Judge
17:07:51 24 tells you to answer.

17:07:53 25 THE COURT: I'm not going to tell you how to

17:07:54 1 answer, but if you can answer yes or no, please do so.

17:07:59 2 A. We did not think about saving some brush that we
17:08:02 3 was told to cut out.

17:08:05 4 Q. Thank you. I want you to take a look at Exhibit
17:08:08 5 17. Is this the hydro-axe, this big contraption here
17:08:12 6 on the front of the big front-end loader?

17:08:17 7 A. I would say yes. I can't see it real clear.

17:08:21 8 Q. Would you tell the jury how big the blade is, how
17:08:25 9 many feet in diameter?

17:08:26 10 A. Well, the blade is about 16 or 17 inches long.
17:08:30 11 It's on an arm that spins around. There's two blades,
17:08:35 12 and the outside of the whole machine is eight feet. So
17:08:38 13 the inside is probably a little less than 7 feet.

17:08:41 14 Q. So it takes a seven-foot swath?

17:08:47 15 A. Yes.

17:09:00 16 MR. ROBON: Nothing further, Your Honor.

17:09:02 17 THE COURT: Any redirect?

17:09:03 18 MR. BAHRET: I don't think so. Thank you.

17:09:05 19 THE COURT: Thank you. You may step down.

17:09:06 20 Thank you.

17:09:08 21 THE WITNESS: Okay. Thank you.

17:09:09 22 THE COURT: Ladies and gentlemen, we're at a
17:09:12 23 break for the day, so I begin by asking you what time
17:09:15 24 you would like to start tomorrow morning. I can tell
17:09:18 25 you based upon counsel's comments to me that I expect

17:09:21 1 that the evidence will be completed tomorrow. I can't
17:09:25 2 tell you what time other than the afternoon at some
17:09:28 3 point in time. Depending when that is will depend
17:09:31 4 whether we continue right into closing and instructions,
17:09:35 5 or whether we come back Friday for that. But you're on
17:09:42 6 the home stretch, so to speak. Do we have any issues
17:09:46 7 on starting time tomorrow with counsel, parties?

17:09:51 8 MR. BAHRET: Would 8:15 -- unless they want
17:09:55 9 to come later, would 8:15 --

17:09:59 10 THE COURT: Is 8:30 okay, a little later
17:10:01 11 start tomorrow? Then let's have the lawyers here no
17:10:10 12 later than 8:15 so that we can take care of some
17:10:13 13 business that we didn't tend to today on the record
17:10:15 14 outside the presence of the jury.

17:10:18 15 Are you able to be here, madam courtroom
17:10:29 16 reporter.

17:10:30 17 THE COURT REPORTER: Yes.

17:10:30 18 THE COURT: Once again, ladies and
17:10:31 19 gentlemen, I'll send you off with hopefully safe driving
17:10:34 20 and a safe return tomorrow and remind you again we're
17:10:37 21 going to be asked at home perhaps, can you tell me about
17:10:41 22 today, or perhaps you're riding home with someone who's
17:10:44 23 been in the courtroom. There may be some desire to
17:10:46 24 have some discussion about what happened in court today.
17:10:49 25 And you cannot, obviously. You can only talk with the

17:10:51 1 jury, and you can only do that when the case is finally
17:10:54 2 submitted to you. So I encourage you to talk with
17:10:57 3 family and friends about the weather, or anything except
17:11:00 4 the case itself. We're in recess.

5 (Adjourned at 5:11 p.m.)

6 - - -

7
8 **C E R T I F I C A T E**

9
10 I certify that the foregoing is a correct transcript
11 from the record of proceedings in the above-entitled
12 matter.

13
14 /s Tracy L. Spore_____

15 Tracy L. Spore, RMR, CRR

_____ Date

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